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BEOFRE THE STATE OF NEVADA ENVIRONMENTAL COMMISSION

In Re: Appeal of Water Pollution Control Permit **NV0022269, Big Springs Mine**	**GREAT BASIN MINE WATCH'S PETITION FOR RECONSIDERATION AND REHEARING**

This Petition seeks reconsideration and rehearing of the State Environmental Commission (SEC or Commission)'s July 10, 2006 Order dismissing GBMW's appeal of the Nevada Department of Conservation and Natural Resources, Division of Environmental Protection (NDEP), Bureau of Mining Regulation and Reclamation (BMRR)'s Renewal of Water Pollution Control Permit (WPCP) NEV0087001 to AngloGold Ashanti (Nevada) Corporation, effective August 15, 2005, for the permanent closure of the Big Springs Mine. Order Dismissing Appeal based on lack of appellant standing pursuant to NRS 233B.127(4) (July 10, 2006).

Great Basin Mine Watch (GBMW) filed the underlying request for an appeal hearing with the Commission on August 5, 2005, pursuant to NRS 445A.605(1). See

Request for Appeal Hearing (August 5, 2005). The SEC scheduled the requested appeal hearing for March 29 and 30, 2006. One week prior to the scheduled hearing, NDEP submitted notice of its intent to challenge GBMW's standing to bring the appeal. NDEP argued that according to NRS 233B.127(4), an amendment to the Nevada APA passed during the 2005 legislative session, GBMW could not appeal NDEP's renewal of WPCP NEV0087001 to the SEC because it does not have a financial interest in the permit. GBMW filed an opposition to NDEP's motion on March 29, 2006.

At the start of the hearing on March 29, 2006, the SEC heard brief argument regarding the State's motion. Upon hearing argument from all parties, the Commission determined to request an official opinion regarding the applicability of NRS 233B.127(4) to GBMW's requested appeal hearing from the Attorney General (AG)'s Office and to stay the underlying appeal hearing pending issuance of the opinion. The hearing was then rescheduled for July 6, 2006.

On June 19, 2006, the AG's Office issued the requested opinion regarding NRS 233B.127(4). The opinion essentially agreed with the arguments made by NDEP before the Commission and held that:

> 1. NRS 233B.127(4) requires a public interest group to demonstrate a financial interest as a direct result of a grant or renewal of a license in order to appeal that grant or renewal to the State Environmental Commission. . . .
>
> 2. Under Nevada law a 'permit' is substantially similar to a "license" for purposes of NRS 233B.127(4). . . .
>
> 3. The restrictions outlined in NRS 233B.127(4) apply to an appeal filed with the State Environmental Commission prior to the effective date of that statutory provision, but where the actual hearing on the matter occurs after its effective date. . . .

> 4. The State Environmental Commission has jurisdiction to hear appeals regarding the grant or denial of a water quality permit pursuant to the terms of NRS 445A.605(1), but it must do so in harmony with the jurisdictional limitations outlined in NRS 233B.127(4). . . .

Attorney General's Opinion (AGO) No. 2006-03 (June 19, 2006).

The SEC reconvened on July 6, 2006, and upon brief argument by the parties, adopted the AG's Opinion, granted the State's motion, and dismissed GBMW's appeal. On July 10, 2006, the SEC entered its Findings of Facts, Conclusions of Law and Order dismissing GBMW's appeal. The SEC held that that a public interest group requesting a hearing from the SEC is required to meet the financial interest requirements of NRS 233B.127(4) and that those requirements apply retroactively to GBMW's appeal, which was filed before the statute became effective. See SEC July 10, 2006 Order. As explained herein, the SEC's decision, and the AG's Opinion it relies upon, is unlawful, unreasonable, and based on erroneous conclusion of law. GBMW, therefore, for the reasons set-forth herein, respectfully petitions the SEC for reconsideration of this matter.[1]

I. THE AG'S OPINION INCORRECTLY INTERPRETS THE PLAIN LANGUAGE OF NRS 233B.127(4).

In dismissing GBMW's appeal, the SEC adopts the Attorney General's opinion regarding the financial interest requirements of NRS 233B.127(4). Relying on a plain language approach to interpreting the statute, the AG concluded that the statute "requires a public interest group to demonstrate a financial interest as a direct result of a grant or renewal of a license in order to appeal that grant or renewal to the State Environmental Commission." AGO, at 2. There are two problems with this conclusion: (1) the plain language approach is not sufficient to ascertain the statutory meaning of NRS

[1] This Petition incorporates by reference all previous arguments, oral and written, GBMW has presented to the Commission on this matter.

233B.127(4); and (2) even if proper, the AG misapplied the plain language approach to the statute at hand. Each will be addressed in turn.

A. The plain language is not sufficient to ascertain the statutory intent of NRS 233B.127(4).

As a general rule, as the AG states, "where a statute is clear and unambiguous on its face, a court may not go beyond the language of the statute in determining the legislative intent." AGO, 2. Here, however, a strict plain language approach is not appropriate for determining the meaning of NRS 233B.127(4) because: (1) the statute is not clear and unambiguous on its face; (2) the plain language interpretation has absurd and impracticable results, and; (3) the plain language approach yields a statute of questionable validity.

1. NRS 233B.127(4) is not clear and unambiguous.

The AG incorrectly concludes that "the language used in NRS 233B.127(4) is clear and unambiguous." AGO, 2. To the contrary, the statute is anything but clear and unambiguous. NRS 233B.127(4) purportedly identifies two classes of individuals that may challenge an agency's decision - those that can demonstrate that:

> (a) His financial situations is likely to be **maintained or to improve** as a direct result of the **grant or renewal** of the license; or
>
> (b) His financial situation is likely to **deteriorate** as a direct result of the **denial** of the license or refusal to renew the license.

NRS 233B.127(4)(emphasis added). Upon close review, however, the statute does not in fact protect two separate classes of people; rather, it only protects those with a positively correlated financial interest in the underlying license. Far from being clear and unambiguous, then, the statute is:

- Redundant - Why is the same group named twice?;

- Unclear - Who is meant to be protected? Did the legislature intend to preclude those who would suffer financial harm from issuance of the license from challenging the license?; and,
- Misleading - The way the statute is written suggests that two groups are protected when in fact only one group – those with a positively correlated financial interest in the license – is protected.

Notably, even the AG misread the statute. As will be explained below, although the AG claims to rely on a plain language approach to statutory interpretation, he incorrectly concludes that, according to the statute, those with a *financial interest* can challenge agency decisions. Mr. James Wadhams, the proponent of the bill, also seems to have misread the statute. In a March 28, 2006 Associated Press article in the Las Vegas Sun, he stated that he "didn't envision the law being used that way." *New law may hamper Nevada mining watchdog group*, Brendan Riley, Associated Press (attached as Exhibit 1).[2] "A statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses." Robert E. v. Justice Court of Reno, 99 Nev. 443, 445 (Nev.,1983) (internal quotations omitted).

Thus, for these reasons, NRS 233B.127(4) is ambiguous, unclear, and the plain language approach to statutory interpretation is inappropriate, or at least, insufficient to ascertain its intent.

[2] This article appeared after the initial hearing on the State's Motion and was referenced by counsel for GBMW at the July 6, 2006 hearing. See SEC, Transcript of Proceedings, at 13 (July 6, 2006).

2. A plain language interpretation of NRS 233B.127(4) leads to absurd results.

Importantly, even if the statute were plain and clear, the Commission is permitted, and in fact required, to go beyond the statute's plain language. It is well established that even where a statute is clear and unambiguous, the court will not limit itself to the apparent plain meaning if doing so leads to absurd, impracticable, or unreasonable consequences. Harris Associates v. Clark County School Dist., 119 Nev. 638, 642, (2003); Avendano-Ramirez v. Ashcroft, 365 F.3d 813, 818 (9th Cir. 2004). Here, the result of a strict plain language reading of the statute is absurd and impracticable.

According to the plain language of NRS 233B.127(4), the only people who can challenge the issuance of a license are those that will see no change to their financial position or will financially benefit from its issuance.[3] Under what scenario would an individual who benefits from issuance of a license, challenge the issuance of that license? The parameters established by the plain language of NRS 233B.127(4) are absurd and would essentially obliterate any administrative review of agency issued licenses. As such, the SEC and AG should not have confined themselves to the plain meaning of the statute in attempting to glean its intent.

3. The plain language of NRS 233B.127(4) is of questionable validity.

Likewise, it is well-established that if the plain language of a statute yields a result that is of questionable constitutional validity, a strict plain language reading of the statute should be rejected. See United States v. Witkovich, 353 U.S. 194, 197-98 (1957) (rejecting the literal reading of a statute because it would generate constitutional doubts

[3] To be clear, those that stand to financially lose if the permit is denied, may challenge the denial. However, the same right is not afforded to those who stand to financially lose if the permit is granted.

as to the validity of the statute); Flores by Galvez-Maldonado v. Meese, 934 F.2d 991, 1017 (9th Cir. 1990) (an interpretation "that would infuse a statute with an unconstitutional cast should be read suspiciously and narrowly"). As will be explained below, here, the plain language of the statute renders a result that is unconstitutional and in violation of federal law. Therefore, despite the general presumption in favor of interpreting statutes based on their plain meaning, here a plan language approach is not appropriate and should be rejected.

B. Even if plain language were the appropriate mode of statutory review, the AG improperly applied it to NRS 233B.127(4).

As explained, the plain language approach to statutory interpretation is insufficient for interpreting the intent of NRS 233B.127(4). However, even if the plain language approach were sufficient, the AG misread the plain language of NRS 233B.127(4), yielding an erroneous result, that does not accurately reflect the plain language of the statute, irrespective of the propriety of the chosen mode of statutory interpretation. Specifically, the AG concluded that "NRS 233B.127(4) requires a public interest group to demonstrate a financial interest as a direct result of a grant or renewal of a license in order to appeal that grant or renewal to the State Environmental Commission." AGO, 2 (emphasis added). That misrepresents the plain language of the statute.

The plain language of NRS 233B.127(4) grants the right of appeal to two groups of people – those who stand to benefit from issuance of a license; and those that will be hurt if a license is denied. A financial interest, according to the plain language of the statute, is not, therefore, sufficient to appeal the grant or renewal of a license. Rather, an individual must posses a financial interest that is positively correlated with the license in

order to challenge the grant of the license. While it may seem like splitting hairs, the difference is significant. For example, and perhaps most poignantly, under the plain language of the statute, an individual who faces financial harm from issuance of a license, does not have the right to challenge the issuance of that license. The AG's opinion misses this important distinction in the statute's plain language and incorrectly implies that a financial interest in an agency issued license, positive or negative, is sufficient to challenge that license.

II. NRS 233B.127(4) DOES NOT APPLY TO THE UNDERLYING APPEAL HEARING REQUESTED BY GBMW BECAUSE IT IS NOT A CONTESTED CASE.

In addition to misinterpreting the plain language of the statute, the AG and SEC also erred by applying NRS 233B.127(4) to dismiss the underlying appeal hearing GBMW requested because the hearing would not have been a contested case. NRS 233B.127(4) expressly applies only to contested cases. It states that:

> [e]xcept as otherwise provided in this subsection, a person must not be admitted as a party to an administrative proceeding in a **contested case** involving the grant, denial or renewal of a license unless he demonstrates to the satisfaction of the presiding hearing officer that:
>
> (a) His financial situation is likely to be maintained or to improve as a direct result of the grant or renewal of the license; or
>
> (b) His financial situation is likely to deteriorate as a direct result of the denial of the license or refusal to renew the license.

NRS 233B.127(4) (emphasis added); see also Hearing on SB 428 Before the Assembly committee on Government Affairs, 2005 Leg., 73rd Sess. 13 (May 17, 2005) (attached as Exhibit 2, compiled and obtained from http://www.leg.state.nv.us/73rd/Reports/

history.cfm?DocumentType=2&BillNo=428, June 26, 2006, at 11)[4](explaining that under NRS 233B.127(4) "[y]ou could not be a party if it were a contested case").

A contested case, in turn, is defined by the APA as "a proceeding, including but not restricted to rate making and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed." NRS 233B.032. As such, NRS 233B.127(4) only applies to hearings that are either: (a) required to be held by the agency prior to determining the legal rights, duties or privileges of a party; or (b) a proceeding that may result in the imposition of an administrative penalty. Here, the underlying appeal hearing does not fall into either of these categories and is, therefore, not a contested case governed by NRS 233B.127(4).

GBMW filed its appeal of WPCP No. NEV0087001 with the SEC pursuant to NRS 445A.605, which provides that,

> 1. Any person aggrieved by:
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> (a) The issuance, denial, renewal, suspension or revocation of a permit; or
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> (b) The issuance, modification or rescission of any other order,
>
> by the Director may appeal to the Commission.
>
> 2. The Commission shall affirm, modify or reverse any action of the Director which is appealed to it.

(emphasis added); see also GBMW's request for an appeal hearing (August 5, 2005).

[4] The legislative history has previously been referenced by GBMW, NDEP and the AG. See SEC, Transcript of Proceedings, March 29, 2006, at 12, 13; SEC, Transcript of Proceedings, July 6, 2006, at 12; AGO, at 5-6.

By the plain terms of the statute, the SEC, upon holding the requested hearing, is not authorized to impose an administrative penalty. The SEC, can only affirm, modify or reverse the challenged permit. Likewise, the SEC was not required by law to hold the requested appeal hearing before determining the rights and duties of the parties, but rather, was only required to hold the appeal hearing because GBMW requested one. The Nevada Supreme Court has held that a hearing conducted pursuant to the sort of permissive language found in NRS 445A.605(1), providing that an aggrieved person "may appeal," does not constitute a "contested matter where the legal rights, duties and privileges of the parties must be determined". Nevada State Purchasing Division v. Georges Equipment Company, Inc., 105 Nev. 798, 803-4 (1989).[5] As such, the appeal hearing GBMW requested was not a contested case and the SEC and AG, erred by applying NRS 233B.127(4) to the requested hearing.

III. THE SEC AND THE AG'S OPINION INCORRECTLY CONCLUDE THAT NRS 233B.127(4) SHOULD APPLY RETROACTIVELY.

Regardless of whether or not the appeal hearing GBMW requested is a contested case, the SEC and the AG incorrectly determined that NRS 233B.127(4) should apply retroactively to GBMW's appeal. In general, as correctly acknowledged by the AG in its opinion, there is a strong presumption against the retroactive application of statutes. AGO, 3. However, the AG asserts that where a statute merely relates to remedies and

[5] The permissive language of the statute was one of several factors considered by the Court in finding that the appeal hearing in Nevada State Purchasing was not a contested case. The Court was also influenced by the fact that: (1) the hearing was required by law to be held within 10 days and did not, therefore, meet the due process requirements of the APA; and (2) the hearing did not meet the notice and other procedural requirements, for contested cases. Although the latter factor is not implicated in the instant case, here as in Nevada Sate Purchasing, the SEC has a very brief time (20 days) to hold hearings requested pursuant to NRS 445A.605. See NRS 445A.610(1).

modes of procedure it should apply retroactively. AGO 3-4. According to that exception, the AG concludes that, NRS 233B.127(4) should apply retroactively to the underlying appeal hearing GBMW requested. Id. The AG's conclusion is flawed because it: (1) overstates the supposed exception to the general rule against retroactivity for statutes and rules affecting remedies and modes of procedure; and (2) overstates and misrepresents the United States Supreme Court's alleged holding in Landgraf v. USI Film Products that jurisdictional rules should apply retroactively. Each issue will be addressed in turn.

A. The AG overstates the supposed "remedies and modes of procedure" exception to the general rule against retroactivity.

The AG cites two cases to support the alleged existence of the "remedies and modes of procedure" exception to the rule against retroactivity, neither of which are particularly persuasive or on point to the case at hand. AGO, 3-4. The AG relies primarily on Truckee River General Electric Co. V. Durham, 38 Nev. 311, 149 P. 61 (1915). AGO 3. That case, almost one hundred years old, arose under the Eminent Domain Act for the taking of property. While the case was pending, the Eminent Domain Act was passed, specifically repealing an earlier 1907 version of the Act. Under the 1907 Act, a set of commissioners determined damages and compensation for the taking of property, whereas the new law provided that a jury should determine damages. Appellants urged the Court to apply the previous Act and to allow the commissioners to determine compensation and damages. The Court, however, rejected their argument, and applied the new statute retroactively. Truckee River, 149 P. at 62.

Although it may appear at first glance, as the AG suggests, that Truckee River supports a finding of retroactive application here, that is not the case. As an initial

matter, the issue in the present case - who has jurisdiction to hear the pending appeal - is markedly different from the issue involved in Truckee River. In Truckee River, the question was who, within the tribunal, would determine remedies; not whether the presiding tribunal had jurisdiction to hear the matter in the first place. The difference is significant.

In the instant case, retroactive application of the statute requires GBMW to find a new venue for its appeal and to start the appeals process all over – causing significant delay and prejudice, particularly considering that the appeal has been pending for nearly a year and did not automatically stay the challenged permit. Had NRS 233B.127(4) been in place when GBMW filed its appeal, it would not have sought review before the SEC, but would have gone directly to State court – avoiding significant costs and lengthy delay.[6] On the other hand, in Truckee River, no such harm or prejudice was incurred, nor would appellants necessarily have proceeded any differently had the new statute been in place when the appeal was filed. As the United States Supreme Court has explained, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." Landgraf, 511 U.S. 244, 265 (1994). Here, the SEC's adoption of the AGO to preclude

[6] Notably, as previously explained, the SEC is required to hold appeal hearings within twenty days of the filing of a request for an appeal hearing. NRS 445A.610(1). Here, more than 11 months have passed since GBMW filed its notice of appeal. GBMW filed its request for the underlying appeal hearing on August 5, 2005. NRS 233B.127(4) did not become effective until October 5, 2005. Had the SEC held the hearing within the statutory time frame, application of NRS 233B.127(4) would not have been an issue as it had not yet been passed by the Legislature.

GBMW's appeal, deprives GBMW of that opportunity and forces GBMW to incur significant costs and prejudice as a result.[7]

In addition, Truckee River is distinguishable from the case at hand because, in Truckee River the Eminent Domain Act specifically and expressly repealed the earlier 1907 Act, thereby exhibiting at least some modicum of legislative intent to apply the statute retroactively. Truckee River General Electric, 149 P. at 62. Here, on the other hand, the legislature has evinced no such intent. The legislature did not appeal the SEC's previous jurisdictional requirements (NRS 455A.605) or the provision of the APA that provides for their ongoing application (NRS 233B.020(2)). Nor did the legislature even mention or consider retroactive application of NRS 233B.127(4) in its several days of discussions regarding the amendment. See Hearings on SB 428 Before the Assembly Committee on Government Affairs, 2005 Leg., 73rd Sess. 13 (April 5 and 14, 2005; May 9, 17, 19, 20, and 31, 2005) (Legislative History attached as Exhibit 2). Again, the difference is significant.

Only where the legislature evinces a clear intent to apply a new rule or statute retroactively will the Courts deviate from the general rule against retroactive application. See McKellar v. McKellar, 110 Nev. 200, 203 (1994) ("[t]here is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent"); Gilman v. Nevada State Board of Veterinary Medical Examiners, 120

[7] The fairness concerns are only exasperated by the fact that the State did not take issue with GBMW's standing earlier in the process. NRS 233B.127(4) became effective on October 5, 2005, but the State did not raise the issue until March 22, 2006, nearly six months after the statute became effective and just one week prior to the scheduled appeal hearing. NDEP's delayed filing of the motion was not only unjustified, but also out of line with the briefing schedule established by the SEC's August 31 and October 24, 2005 Order.

Nev. 263, 89 P.3d 1000, 1008 (2004) (holding that a statutory amendment did not apply retroactively "because the legislature did not clearly show that it intended the statute to apply retroactively"). Likewise, in Madera.v. State Industrial System, 114 Nev. 253 (1998), the other case relied upon by the AG to support the alleged existence of the "remedies and modes of procedure" exception, the relevant factor was not the procedural nature of the new rule, but rather, the legislature's expressed intent to apply the rule retroactively. In the instant case, as opposed to these cases and Truckee River, the legislature exhibited no such intent.

Notwithstanding, or even withstanding Madera and Truckee River, it is questionable whether in Nevada the "remedies and modes of procedure" exception to the general rule against retroactivity really exists. The Nevada Supreme Court has repeatedly held that statutes should not be applied retroactively unless the legislature has indicated a clear intent to the contrary. See State v. State Bank & Trust Co., 187 P. 1002, 1003 (1920) ("Every reasonable doubt is resolved against a retroactive operation; and, if all the language of a statute can be satisfied by giving it prospective action only, that construction will be given."); McKellar, 110 Nev. at 203 ("[t]here is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent"); Gilman, 120 Nev. at 263 (holding that a statutory amendment did not apply retroactively "because the legislature did not clearly show that it intended the statute to apply retroactively"). The United States Supreme Court has only echoed this general rule. See Landgraf, 511 U.S. at 265 ("[a]s Justice Scalia has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic").

In addition, in several cases involving what would seem to be rules regarding remedies and modes of procedure, the Nevada Supreme Court ruled against retroactivity. See Halloway v. Barrett, 87 Nev. 385, 385 (1971) (rejecting retroactive application of a statute regarding the methods for calculating deficiency judgment); Virden v. Smith, 46 Nev. 208, 210 P. 129, 130 (1922) (rejecting retroactive application of a statutory amendment to the Workmen's Compensation Act changing the remedy for "permanent total disability"); McKellar, 110 Nev. at 203-4 (rejecting retroactive application of a statutory amendment eliminating a limitations period before collecting child support). Notably, the AG relies on each of these cases in his opinion to support the general presumption against retroactivity, yet fails to reconcile them with his argument that an exception exists for statutes affecting "remedies and modes of procedure." AGO, 3. It is, therefore, highly suspect that an exception to the general presumption against retroactivity exists, as the AG alleges for statutes relating solely to "remedies and modes of procedures," or, as explained, that such an exception, if it does exist, would apply to NRS 233B.127(4).

B. The AG overstates and misrepresents the holding in Landgraf.

In addition, to overstating the supposed "remedies and modes of procedure" exception to the general presumption against retroactivity, the AG incorrectly relies on Landgraf for the blanket proposition that jurisdictional statutes should apply retroactively. AGO, 4. As explained in detail in GBMW's opposition to NDEP's notice of intent to challenge GBMW's standing to bring the underlying appeal before the State Environmental Commission, that is a misstatement of the holding in Landgraf. GBMW's Opposition, at 3-4.

To the contrary, the court in Landgraf specifically explained that "[t]his jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect **unless** such construction is required by explicit language or by necessary implication." Landgraf, 511 U.S. at 274 n. 27 (internal quotation omitted) (emphasis added). Thus, while the Court in Landgraf recognized that jurisdictional rules may, on occasion, be applied retroactively, it retained the general presumption against retroactivity even for changes to jurisdictional statutes and, importantly, declined to apply the statute retroactively.

In Nevada, the Supreme Court has, in some instances, applied new jurisdictional rules retroactively. However, it appears that it has only done so where the rule expands, rather than contracts prospective judicial review. See e.g. State Dept. of Motor Vehicles v. McGuire, 108 Nev. 182, 184 (1992) (holding that an amendment allowing agencies, not just individuals, to appeal should be applied retroactively). Likewise, in Nakaranurack v. U.S., a case relied upon by the AG to support his interpretation of Landgraf, the United States Court of Appeals for the Ninth Circuit applied a statute retroactively where it expanded rather than narrowed jurisdiction. 231 F.3d 568 (9th Cir. 2000) (applying a statute retroactively to grant the district court jurisdiction to review a habeas proceeding).

In fact, in Nakaranurack the Court explained that,

> Indeed, both the Supreme Court and our court have retroactively applied new jurisdictional rules that grant jurisdiction, even where jurisdiction was lacking at the time the action was filed. In Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 608 n. 6, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978), the plaintiff filed suit at a time when federal law required plaintiffs to allege a set amount in controversy ($10,000) in federal question cases. The plaintiff failed to allege a sufficient amount in controversy; however, while the case was pending on appeal, Congress passed a statute that eliminated the amount in controversy requirement for federal

> question cases. Id. at 607-08, 98 S.Ct. 2002. Although the district court lacked jurisdiction over the case when it was filed, the Supreme Court held that it now had jurisdiction. Id.

231 F.3d at 571.

These cases clearly demonstrate that retroactive application of jurisdictional rules may be appropriate where there is an expansion as opposed to a narrowing of jurisdiction, as results here from the SEC's decision to block GBMW's appeal. This trend, to grant retroactive application to statutes and rules that expand jurisdiction is consistent with the Supreme Court's holding in Landgraf that "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." Id. at 274 (emphasis added). In a similar vein, the Court in Landgraf cautioned against applying statutes retroactively if they would impair preexisting rights possessed by a party, 511 U.S. at 245. Again, the conclusion that NRS 233B.127(4) should not apply retroactively to the underlying appeal comports with this view.

In sum, the Nevada Supreme Court, consistent with the position of the United States Supreme Court, has repeatedly held that statutes should not apply retroactively absent specific legislative direction to the contrary. The AGO ignores this long line of jurisprudence and instead advocates for retroactive application of NRS 233B.127(4) to GBMW's appeal. There is no sound basis for the AGs' conclusion – the legislature did not express an intent to apply NRS 233B.127(4) retroactively; retroactive application would result in unfairness and substantial prejudice to GBMW; and retroactive application would constrict judicial review, thereby, seriously hindering GBMW's ability to seek prospective relief. The Commission therefore, erred by accepting the AG's conclusion to apply NRS 233B.127(4) retroactively to GBMW's appeal.

IV. THE SEC AND THE AG'S OPINION NULLIFIES THE LEGISLATURE'S SPECIFIC AND SEPARATE GRANT OF JURISDICTION TO THE SEC TO HEAR APPEALS FROM "ANY AGGRIEVED PERSON."

Nevada's Water Pollution Control Law specifically and separately establishes the right of appeal to the SEC for "any person aggrieved by: (a) the issuance, denial, renewal, suspension or revocation of a permit; or (b) the issuance, modification or rescission of any other order." NRS 445A.605(1).[8] The Attorney General's Opinion incorrectly concludes that NRS 233B.127(4) renders this provision null and void. There is, however, no need, and indeed no authority, to read NRS 445A.605(1) out of the statutory structure.

First, as already explained, NRS 233B.127(4) does not apply to appeal hearings filed pursuant to NRS 445A.605 because it is not a contested case. Second, even if the requested hearing were a contested case, it would be improper to apply NRS 233B.127(4), as the SEC has done here, to bar the underlying appeal. The APA, by its plain terms, does not supersede or abrogate other jurisdictional statutes that apply to specific agencies. The APA expressly provides that,

> The provisions of this chapter are intended to supplement statutes applicable to specific agencies. This chapter does not abrogate or limit additional requirements imposed on such agencies by statute or otherwise recognized by law.

NRS 233B.020(2).[9] Here, the legislature has specifically provided "any aggrieved person" with the right to appeal NDEP's permitting decisions to the SEC, regardless of financial interest. This right, by the plain terms of the APA, is undisturbed by the legislature's later adoption of NRS 233B.127(4).

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[8] The SEC's own regulations reiterate this right of appeal. NAC 445A.388 ("[a]ny person aggrieved by an action taken by the department pursuant to NAC 445A.350 to NAC 445A.447, inclusive, may appeal to the Commission").

[9] Notably, even the AG's own opinion recognizes that the APA merely establishes "minimum procedural requirements" that agencies are fee to add to or amend. AGO, 5.

As explained by the AG himself in the opinion, the legislature is presumed to have acted with full knowledge of preexisting statutes, including other provisions of the APA and Nevada's Water Pollution Control Law. See AGO, 5. Had the legislature intended NRS 233B.127(4) to amend the SEC's authority to hear appeals pursuant to the Nevada Water Pollution Control Law, it would have so stated, or it would have amended the Water Pollution Control Law, or at a minimum, amended NRS 233B.020(2). The legislature, however, did none of these things.

Second, it is a well-accepted canon of statutory construction that when two statutory provisions are in conflict, the more specific of the two should apply. See Mineral County v. State, Bd. of Equalization, 2005 WL 2233558, *4 (Nev.) (2005) (discussing and applying the "canon of statutory construction that requires statutes to be read in harmony but promotes the use of a specific statute over that of a general statute where they pertain to the same topic"); Western Realty Co. v. City of Reno, 63 Nev. 330, 337, 172 P.2d 158, 161 (1946) ("[i]t is a well settled rule of statutory construction that a special provision, dealing expressly and in detail with a particular subject, is controlling, in preference to a general provision relating only in general terms to the same subject"). Despite NRS 233B.127(4), the provision of Nevada's Water Pollution Control Law that specifically defines the SEC's jurisdiction is plainly more specific and narrow than the general jurisdictional limits prescribed by the APA and should, therefore, prevail.

In addition to ignoring the canon of statutory construction that the more specific of two statutes should prevail, the AG's conclusion also belies the very canon of statutory construction it professes to follow. The AG correctly states that when two statutory provisions are in conflict, there is an obligation to, as possible, render them compatible

with each other and to avoid an interpretation that renders any language "mere surplusage." AGO, 5 (internal quotation omitted). Ironically, the interpretation the AG advances – that NRS 233B.127(4) prescribes the limits on the SEC's jurisdiction – renders the SEC's own jurisdictional statute, NRS 445A.605, null and void and, therefore, does not fulfill that mandate. If NRS 233B.127(4) defines the limits of the SEC's jurisdiction, what then does NRS 445A.605 add? The answer is nothing; the result, under the AG's interpretation would be the same regardless of the existence of NRS 445A.605. Therefore, even using the AG's own preferred canon of statutory construction, that no portion of the statutory structure should be rendered meaningless, the AG's conclusion must be rejected.

To the contrary, the interpretation advanced by GBMW, that NRS 233B.127(4) notwithstanding, the SEC retains its own specific grant of jurisdiction pursuant to NRS 445A.605, comports with both canons of statutory construction. Under this interpretation, both statutes would retain effect – the SEC would maintain its NRS 445A.605 jurisdiction to hear appeals by "any aggrieved person," while NRS 233B.127(4) would continue to apply to <u>other</u> agencies that do not, like the SEC, have a more specific grant of jurisdiction. As such, no parts of the statutory structure would be rendered meaningless and the more specific of the competing statutes, the SEC's statute, would apply over the more general APA provision.

V. <u>THE AG'S INTERPRETATION OF NRS 233B.127(4) IS NOT SUPPORTED BY THE LEGISLATIVE HISTORY.</u>

As the AG correctly states, statutes should be read to give rise to their underlying legislative intent. AGO, 5. It is well established that, when used to ascertain legislative intent, legislative history should be looked at as a whole rather than in isolated parts.

See, State Farm Mut. Auto. Ins. Co. v. Commissioner of Ins., 114 Nev. 535, 541, (1998) (using "[a] reading of the legislative history as a whole" to ascertain legislative intent); People of State of Cal. ex rel. State Water Resources Control Bd. v. E.P.A. 511 F.2d 963, 969 -975 (9th Cir.1975) (declining to view parts of the legislative history "in isolation"). Here, however, the AG erroneously relied on a skewed and selective review of the legislative history of NRS 233B.127(4) in order to ascertain its intent.[10]

To be exact, the AG relied upon one statement, out of approximately twenty pages of comments, made by one representative to conclude that, in passing NRS 233B.127(4), the legislature intended to "limit the participation of public interest groups in the administrative hearing process." AGO, at 5. Looking at the legislative history as a whole, however, a different intent emerges. The comment relied upon by the AG aside, the remainder of the legislative discussion never once mentions or addresses the use of NRS 233B.127(4) in this context - to block public interest groups from requesting appeal hearings before the State Environmental Commission. To the contrary, the legislative history focuses almost entirely on private licensing proceedings, such as proceedings before the Pharmacy Board, Workers Compensation Board, the Sate Board of Nursing, or the Industrial Insurance process. See e.g. Legislative History (attached), at 2, 5, 8, 9. Interestingly, even James Wadhams, the proponent of the bill stated that he never intended the statute to apply, as it has been applied, in the current context. See infra, at 3 n.1.

[10] Ironically, the AG at one point in his decisions states that NRS 233B.127(4) is clear and unambiguous on its face such that it may not go beyond the plain language to ascertain its intent, AGO, at 2; yet then proceeds, later in the decision, to review the legislative history. AGO, at 5.

In addition, and importantly, the legislative history indicates that the legislature intended to merely codify preexisting standards that had already been informally adopted by decision-making bodies to determine standing. See Hearing on SB 428, Before the Assembly Committee on Government Affairs, 2005 Leg., 73rd Sess. 13 (May 20, 2005) (Exhibit, at 2 at 18). As Mr. Wadhams explained, "[w]hat we have done here is merely import the case law to give guidance to the hearing officers" as to who should have standing." Id. However, the preexisting practice of state agencies has never been to limit standing to those with a positive financial interest, but rather to broadly grant standing to all those with legitimate interests, financial, positive or negative, and non-financial alike. See e.g., SEC, March 29, 2006 Transcript, at 14 (comments from Commissioner Crawforth, "in my other life, I am very involved in regulations and I think public processes, a plethora of laws make sure the public has the opportunity to be involved in rule making and implementation, not only in this state but in this country").

As explained, prior to implementation of NRS 233B.127(4) the SEC, by statute, heard appeals from "any aggrieved person." NRS 445A.605(1). The courts have interpreted the term "aggrieved person" to include those with any legitimate, substantial, not merely financial, interests. See e.g. Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 446 (1994) (an aggrieved party includes one whose personal right or property right is injuriously affected); Kenney v. Hickey, 60 Nev. 187, 105 P.2d 192, 193 (1940) (same); Kondas v. Washoe County Bank, 50 Nev. 181, 254 P. 1080, 1081 (1927) ("aggrieved party" is one injured).

Likewise, in general, the Nevada Supreme Court has routinely applied the federal Court standing requirements under Article III of the United States Constitution. See, e.g.

Miller v. Ignacio, 112 Nev. 930, 936 (1996); Kirkpatrick v. Eight Judicial District Court, 118 Nev. 233, 241 (2002). Article III does not require a showing of financial harm. To the contrary, it is well established that "injury to health or to aesthetic, environmental, or recreational interests will suffice." Commonwealth of Virginia v. Browner, 80 F.3d 869, 879 (4th Cir. 1996). Accordingly, the Nevada Supreme Court has routinely conferred standing on those with negative financial interests, as well as those with non-pecuniary interests. See e.g., City of Reno v. Goldwater, 92 Nev. 698, 850 (1976) (recognizing that all citizens, not just property owners, have standing to challenge land use decisions); Kirkpatrick, 118 Nev. at 241 (standing for loss of parent-child relationship); Helms v. State, 109 Nev. 310, 311 (1993) (reviewing appeal of wastewater discharge permit filed by adjacent property owner before the SEC).

The legislature, it appears, never intended to narrow that result. As Mr. Wadhams himself explained, "This is a due process issue that just protects the little guy who cannot afford a lawyer to protect himself . . . The only people who can get in and cross examine witnesses are people who have a **stake** in the matter." Legislative history, at 18 (emphasis added).

VI. THE SEC DECISION VIOLATES FEDERAL LAW AND PUTS NEVADA IN DANGER OF LOSING CONTROL OVER IMPLEMENTATION OF THE CLEAN WATER ACT AND CLEAN AIR ACT WITHIN THE STATE.

The United States Environmental Protection Agency (EPA) has delegated the authority to implement the federal Clean Water Act (CWA) and Clean Air Act (CAA) to the State of Nevada. See e.g., 71 Fed. Reg. 15041 (March 27, 2006) (recent SIP rules approval); 68 Fed. Reg. 52837 (Sept. 8, 2003) (partial PSD Delegation); 57 Fed. Reg 5586, 5597 (August 10, 1992) (NPDES Program delegated in 1975); 60 Fed Reg. 63631

(Dec. 12, 1995) (Interim Approval of Nevada's Title 5 Program). Under this delegated authority, Nevada is responsible for implementing the federal CWA and CAA requirements within the state via the development of its own programs and the issuance of permits in accordance with those programs. See e.g., 42 U.S.C. § 7661a (Title V of the CAA prohibits major stationary sources of air pollution from operating without a permit, but directs the states to develop their own programs for issuing permits); 33 U.S.C. § 1342(b) (The CWA authorizes states to establish their own permitting programs consistent with federal law).

As a condition precedent to this delegated authority, Nevada's programs must meet certain minimum criteria set forth in the federal acts and their regulations. See, e.g., 42 U.S.C. § 7661a (Clean Air Act); 33 U.S.C. § 1342(b) (Clean Water Act). If Nevada's programs fail to meet these minimum requirements EPA may withdraw Nevada's delegated authority and resume federal implementation of the programs within the State. 42 U.S.C. § 7661a(d)(3); 33 U.S.C. § 1342(c)(2)-(3).

Preeminent among the requirements a state's program must meet, is the requirement that a state provide for citizen participation in administrative and judicial review of state permitting actions. See 42 U.S.C. § 7661a(b)(6) (Clean Air Act); 33 U.S.C. § 1369(b)(1) (Clean Water Act); see also 40 C.F.R. § 70.4(b)(3)(x) (Clean Air Act); 40 C.F.R. § 123.30 (Clean Water Act). EPA has consistently interpreted these requirements to mean that a state must provide for standing in the judicial review of permitting decisions that is at least as broad as the federal court standing requirements under Article III of the United States Constitution. See e.g., *Notice of Deficiency for Clean Air Act Operating Permits Program in Oregon*, 63 Fed. Reg. 65783, 65783 (Nov.

30, 1998); 40 C.F.R. 123.30 (CWA requirements for judicial review); *Clean Air Act Final Disapproval of Operating Permit Programs; Commonwealth of Virginia*, 59 Fed. Reg. 62324, 62325 (Dec. 5, 1994). See also, *Letter from the Utah Attorney General to EPA regarding the Authority of the State of Utah to Implement and enforce an operation permit program pursuant to the CAA*, at 16 (March 28, 1994) (certifying that Utah's program provides for the required kevel of judicial review, i.e., the standing requirements of Article III of the U.S. Constitution) (attached as Exhibit 3).

Article III requires that a potential litigant show: "(1) actual or imminent injury that is concrete and particularized, (2) causal connection between the challenged conduct and the injury; and (3) likelihood that the injury would be redressed by favorable judicial action." Lujuan v. Defenders of Wildlife, 504 U.S. 555, 559-61 (1992). Article III does not require a showing of financial harm. To the contrary, it is well established that "injury to health or to aesthetic, environmental, or recreational interests will suffice." Commonwealth of Virginia v. Browner, 80 F.3d 869, 879 (4th Cir. 1996).

State programs that do not provide for this requisite level of judicial review are unlawful. See Commonwealth of Virginia, 80 F.3d at 877-80 (holding that Virginia's limitation of appeals of CAA title V permits to those with a pecuniary interest did not comply with the recruitments of federal law). In fact, EPA's rules for state-run Clean Water Act programs specifically provide that:

> All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit . . . . A state will not meet this standard if it narrowly restricts the class of person who may challenge the approval or denial of permits (for example,

> if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge of surface waters in order to obtain judicial review).

40 CFR § 123.30; see also e.g., 42 USC § 7661a(b)(6) (similar provision in title V of Clean Air Act).

Here, the AG has advanced, and the SEC has adopted, a position that impermissibly requires a showing of financial interest as a prerequisite to challenging NDEP issued permits, including those issued pursuant to Nevada's delegated authority under the CWA and CAA, before the SEC. Importantly, the financial requirement would apply equally to administrative proceedings and judicial review in state courts. The plain language of the Nevada Administrative Procedures Act limits the right of judicial review of agency decisions to those who sought and obtained administrative review before the underlying agency. NRS § 233B.130 *et seq* (limiting judicial review to those who were "(a) Identified as a party of record by an agency in an administrative proceeding; and (b) Aggrieved by a final decision in a contested case"); *see also* NRS § 233B.035 (defining party as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any contested case").

Accordingly, because the Nevada APA confines judicial review of NDEP/SEC decisions in Nevada courts to "parties" in contested cases before the administrative agency, the new Nevada statute, as interpreted by the AG and the SEC, precludes all aggrieved persons who would not financially benefit or remain the same by NDEP's issuance or renewal of a permit from obtaining administrative and judicial review. As explained, such a barrier to judicial review is unlawful under the CWA and CAA. The State Environmental Commission is, therefore, in violation of federal law and Nevada's

delegated authority to implement the CWA and CAA is in serious jeopardy, making the federal resumption of control over these programs likely if not imminent.[11]

VII. THE AG'S OPINION AND THE SEC'S DECISION IS UNCONSTITUTIONAL.

The Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. §1 In this case, as will be explained, the SEC's interpretation of NRS 233B.127(4) violates both the Equal Protection and Due Process clauses of the Fourteenth Amendment. In addition, the SEC's decision violates the First Amendment of the Untied States Constitution, which provides for the freedom of speech and the right to petition the government for grievances. As such, the SEC's interpretation of NRS 233B.127(4) to block GBMW's appeal of the underlying permit is unconstitutional and must be rejected.

A. NRS 233B.127(4) violates the Equal Protection Clause.

The Equal Protection clause of the Fourteenth Amendment commands that "no state shall deny any person within its jurisdiction the equal protection of the laws." Nordlinger v. Hahn, 505 US 1, 10 (1992) (internal quotations omitted). As the United States Supreme Court has explained, "[i]n considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a

[11] A coalition of public interest organizations and interested individuals have already filed a petition with EPA to revoke Nevada's delegated authority. See Letter from Nicole Rinke to EPA regarding Petition to Revoke Nevada's Clean Air Act and Clean Water Act Programs (July 7, 2006) (attached as Exhibit 4). This letter was sent after the SEC held the underlying hearings.

statutory classification must be rationally related to a legitimate governmental purpose." Clark v. Jeter, 486 U.S. 456, 461 (1988). Statutes that classify individuals based on fundamental rights, receive strict-scrutiny review, whereas all other statutes are subject to rational-basis review. Nordlinger, 505 U.S. at 10.

Here, NRS 233B.127(4) distinguishes between two different types of people on the basis of pecuniary interest. Specifically, it grants the right of administrative and judicial review to individuals who stand to financially benefit (or stay the same) from an agency's issuance of a permit, while denying the right of review to those who are financially or otherwise harmed by issuance of the permit. Likewise, it distinguishes between those people with a positive financial interest in an agency's decision; and those with other-non-pecuniary interests. While significant, neither distinction implicates a fundamental right and is, therefore, subject to rational basis review.

Rational Basis review requires that that a statutory classification be rationally related to a legitimate government purpose. U.S. R.R. Retirement Bd. v. Fritz 449 U.S. 166, 183-184 (1980). As the United States Supreme Court has explained, "[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Johnson v. Robison, 415 U.S. 361, 374-375 (1974) (internal quotations omitted). A legitimate government purpose is said to exist if "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification

to its goal is not so attenuated as to render the distinction arbitrary or irrational." Fitzgerald v. Racing Ass'n of Central Iowa 539 U.S. 103, 107 (2003).

Here, the distinction NRS 233B.127(4) creates between those with a negative versus positive financial interest has no rational relation to the object of the legislation. To the contrary, the legislative history indicates that the legislature never intended to distinguish between those with a financial benefit and those facing financial harm. In fact, the phrase "financial interest" is used repeatedly throughout the legislative history indicating that the statute was intended to grant standing to those with a financial interest, positive or negative, in an agency's decision. See Legislative History (using the term "financial interest" eleven times); see also Legislative History, at 13 ("I will quickly review that this bill prohibits the admission of a party to an administrative proceeding in a contested case involving grant or denial or renewal of a license, if the person does not have a direct financial interest in the license").

In addition, the classification between financial winners and financial losers is clearly arbitrary - why would someone who stands to benefit from an agency's issuance of a permit, challenge that permit? The simple answer is, they would not. The effect of the statute, then, is to grant the right of administrative and judicial review only to those individuals who would have no interest in or need to seek review while excluding those who would. This arbitrary, baseless, unsupported classification plainly violates the Equal Protection clause.

NRS 233B.127(4)'s distinction between those with financial interests and those with other, non-pecuniary interests, likewise, lacks a rational basis. The only evidence of the basis for the decision to exclude those with non-pecuniary interests from the

administrative and judicial review processes provided for by the APA arises from a comment made by Representative Goiciochea during the committee hearings on the bill -

> This would exempt, for example, the Sierra Club or some other group that really didn't have standing—and let's move away from the licensing, like a bar license, and figure some other entity—and would preclude them from coming in and having standing in the administrative appeals, which will probably end up in some court of competent jurisdiction. It is an attempt to narrow down who can play through the administrative process and judicially.

Animosity towards a particular class of people holding a particular viewpoint, does not, however, constitute a rational basis. See Cleburne v. Cleburne Living Center, 473 U.S. 432, 447 (1985); Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973). To the contrary, the United States Supreme Court has expressly held that "a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." Kelo v. City of New London, Conn. 125 S.Ct. 2655, 2669 (2005). Likewise, the Court has held that a law that exhibits "a desire to harm a politically unpopular group," does not reflect a legitimate government interest. Lawrence v. Texas, 539 U.S. 558, 579-580 (2003).

In this case, particularly given the legislative history, it is difficult to imagine any basis other than a pretextual, politically motivated basis for the classification NRS 233B.127(4) creates between those with pecuniary interests and those without. Indeed, the AG's Opinion itself concludes that the legislative intent of NRS 233B.127(4) was to "limit the participation of public interest groups in the administrative hearing process." AGO, at 5. Because the classification appears to be motivated by animosity towards a particular, politically unpopular class, it lacks a rational basis and cannot be upheld.

B. NRS 233B.127(4) violates Due Process.

The Fourteenth Amendment provides for the protection of both substantive and procedural due process. Specifically, it provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. §1. In this case, NRS 233B.127(4) implicates both substantive and procedural due process.

Substantive due process protects an individual's rights to life, liberty and property. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Property includes, in its most basic form, real property such as land or water subject to water rights. A statute that interferes with a property owner's use of his property, may give rise to a substantive due process claim. See, Rosalie Berger Levinson, *Protection Against Government Abuse Of Power: Has The Court Taken the Substance out of Substantive Due Process*, 16 UDTNLR 313, Winter, 1991., at 356. Here, NRS 233B.127(4) could very well interfere with one's property. According to the statute, someone whose property is harmed by an agency's issuance of a permit would not have the right to challenge the permit and would, therefore, suffer loss of property in violation of the Due Process Clause of the United States Constitution.

NRS 233B.127(4) likewise, and perhaps even more so, implicates the procedural due process requirements of the Fourteenth Amendment. Procedural due process requires that,

> Parties whose [substantive, protected] rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.

Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (internal quotations and citations omitted). As explained, an individual's property and health is a protected substantive due process right. According to the plain terms of NRS 233B.127(4), if an individual's property or health is harmed by an agency's decision to issue a permit, they have no administrative or judicial recourse and, therefore, no procedural due process.

Interestingly, the initial proponent of the bill, Mr. Wadhams, explained to the Senate Committee that,

> This is a due process issue that just protects the little guy who cannot afford a lawyer to protect himself. It is giving him direct guidance from the Legislature to the hearing officer. The only people who can get in and cross-examine witnesses are people who have a stake in the matter.

Legislative History, at 18. To the contrary, however, at least within the context of a NDEP issued permit, the parties protected by NRS 233B.127(4), those that stand to financially gain from the granting of a license, are generally large businesses, not "little guys" as Mr. Wadhams otherwise suggested. More accurately, the statute precludes the "little guy," the numerous public citizens who may be harmed, financially, environmentally or health wise, from challenging an agency's issuance of a permit or license that threatens such harm. NRS 233B.127(4), far from protecting the little guys, is pro-business, anti public participation and patently violates the due process clause of the Fourteenth Amendment of the United States Constitution by depriving individuals of their ability to assert and protect their substantive rights.

C. The SEC's interpretation of NRS 233B.127(4) violates the Supremacy Clause.

The Supremacy Clause of the United States Constitution provides that:

> This [the U.S.] Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under

> the authority of the United States, shall be Supreme Law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding.

U.S. Const. Art. VI ¶ 2. The Nevada Constitution likewise provides that,

> the paramount allegiance of every citizen is due to the Federal Government in the exercise of all its Constitutional powers as the same have been or may be defined by the Supreme Court of the United States and no power exists in the people of this or any other State of the Federal Union to dissolve their connection therewith or perform any act tending to impair [,] subvert, or resist the Supreme Authority of the government of the United States.

Nev. Const. Art. 1, § 2.

Because federal law is the "supreme law of the land," when there is a conflict between a state law and a federal law, the federal law trumps, or preempts, the state law, not vie-a-versa. Savage v. Jones, 225 U.S. 501, 533 (1912). Impermissible preemption by the State is said to occur where "under the circumstances of a [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, __67_ (1941).

Here, the SECs's interpretation of NRS 233B.127(4) interferes with the scheme established by Congress providing for citizen enforcement of certain environmental laws. As explained, the CWA and CAA require a certain level of citizen involvement in enforcement , as well as access to administrative and judicial review of decisions rendered pursuant to those acts. See supra 23-26; Friends of the Earth, Inc v. Laidlaw Environmental Servs (TOC), Inc., 528 U.S. 167, 174, 185 (2000) (recognizing the role that citizens play in halting and preventing pollution). The SEC's decision to deny

citizens' access to administrative and judicial review of NDEP's permitting decisions, included those made under the CWA and CAA, clearly goes against the intent of those laws and prevents their full implementation as intended by Congress. The SEC's decision therefore, constitutes impermissible preemption of federal law and cannot stand.

D. The SEC's interpretation of NRS 233B.127(4) violates the Freedom of Speech guaranteed by the Nevada and United States Constitutions.

The First Amendment of the United States Constitution and Article 1 of the Nevada Constitution protect the Freedom of Speech. U.S.C.A. Art. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances"); Nev. Const. art. 1, § 9 ("Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain nor abridge the liberty of speech or of the press.").

The Freedom of Speech protected by the First Amendment includes advocacy against governmental intrusions via litigation. See National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 429 (1963); see also, United Transportation Union v. State Bar of Michigan 401 U.S. 576, 576 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967); Terminello v. Chicago, 337 U.S. 1, 4 (1949); Thomas v. Collins, 323 U.S. 516, 537 (1945); Herndon v. Lowry, 301 U.S. 242, 259-64 (1937). The SEC's decision will have an unconstitutional, chilling effect on

lawful, zealous advocacy and is, therefore, unconstitutional. See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 234 (2002).

E. The SEC's interpretation of NRS 233B.127(4) violates the First Amendment Right to Petition.

The First Amendment of the United States Constitution likewise protects an individual's right to petition the government for a redress of grievances. U.S.C.A. Const. Amend. 1. The right to access the courts is one aspect of this right. Johnson v. Avery, 393 U.S. 483, 497 (1969); see also Boy Scouts of America v. Dale, 530 U.S. 640, 678 (2000); Roberts v. United State Jaycees, 468 U.S. 609, 617 (1984); California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 612 (1972); Ex parte Hull, 312 U.S. 546, 549 (1941). Administrative and judicial review are often the only avenues open for citizens to obtain redress of governmental grievances. As such, the State's interpretation of NRS 233B.127(4) to exclude those seeking to redress financial and non-financial grievances, violates the Right to Petition and is unconstitutional.

VIII. CONCLUSION

For the foregoing reasons, and for the reasons set-forth in GBMW's opposition to NDEP's notice of intent to challenge GBMW's standing to bring the underlying appeal before the State Environmental Commission, and the comments made by GBMW during the March 29, 2006, and July 6, 2006 hearings, GBMW respectfully requests that the SEC reconsider its decision to adopt the AG's opinion and dismiss GBMW's appeal.

Respectfully submitted this 25th day of July, 2006.

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CERTIFICATE OF SERVICE

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