

1 Case No.  
2 Dept No.

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5  
6 **IN THE FIRST JUDICIAL DISTRICT COURT**  
7 **OF THE STATE OF NEVADA IN AND FOR CARSON CITY**  
8

9  
10 \_\_\_\_\_ )  
11 GREAT BASIN MINE WATCH, )

12 )  
13 Petitioner )

14 )  
15 vs. )

16 )  
17 STATE OF NEVADA DEPARTMENT OF )  
18 CONSERVATION AND NATURAL RESOURCES; )  
19 DIVISION OF ENVIRONMENTAL PROTECTION; )  
20 BUREAU OF MINING REGULATION AND )  
21 RECLAMATION; STATE )  
22 ENVIRONMENTAL COMMISSION; AND )  
23 ANGLOGOLD ASHANTI (NEVADA) CORPORATION )

24 )  
25 Respondents. )  
26 )  
27 \_\_\_\_\_ )

**PETITION FOR  
JUDICIAL REVIEW  
AND ALTERNATIVE  
REQUEST FOR  
EXTRAORDINARY  
WRIT RELIEF**

28 Great Basin Mine Watch (GBMW) hereby petitions this court for judicial review,  
29 pursuant to the State Administrative Procedure Act (APA), NRS 233B.010 et seq. of the  
30 Nevada Department of Conservation and Natural Resources Division of Environmental  
31 Protection (NDEP), State Environmental Commission (SEC)'s July 10, 2006 Order  
32 (attached) dismissing GBMW's appeal of NDEP's renewal of Water Pollution Control  
33 Permit (WPCP) NEV0087001 for the Big Springs Mine. GBMW also challenges the  
34 NDEP's issuance of the underlying permit as described herein. In the event that this  
35 Court finds that GBMW lacks standing to bring the underlying appeal before the SEC,  
36 GBMW asks this Court for an extraordinary writ to review the legality of WPCP  
37 NEV0087001.

1 In support of this Petition, GBMW states the following:

2 **INTRODUCTION**

- 3 1. On July 26, 2005, NDEP's Bureau of Mining Regulation and Reclamation  
4 (BMRR) issued its renewal of Water Pollution Control Permit NEV0087001 to  
5 AngloGold Ashanti (Nevada) Corporation, effective August 15, 2005, for the  
6 permanent closure of the Big Springs Mine.
- 7 2. The Big Springs Mine is a post-closure open pit gold mine located approximately  
8 60 miles north of Elko, Nevada, in the Independence Mountains along the North  
9 Fork of the Humboldt River (NFHR). The site consisted of various processing  
10 and mining facilities, including twelve open pits and six waste rock disposal areas  
11 (RDAs). In total, the site disturbed approximately 558 acres on primarily public  
12 land located within the Humboldt-Toiyabe National Forest.
- 13 3. The mine has been in closure since 1995.
- 14 4. The NFHR is home to Lahontan Cutthroat Trout (LCT), a federally recognized  
15 threatened species, and several other fragile and valuable species, including the  
16 spotted frog, a candidate for listing as threatened or endangered.
- 17 5. Since its closure in 1995, the mine has been and continues to discharge pollutants  
18 from several sources into the NFHR and several of its tributaries. These  
19 discharges are causing elevated levels of several constituents in the NFHR and its  
20 tributaries, specifically selenium, total dissolved solids (TDS), or salt, sulfate,  
21 manganese, and arsenic.

- 1 6. Water quality impacts are a result of discharges to surface and ground waters  
2 from three groups of sources – (1) Six RDAs; (2) two pit lakes; and (3) a  
3 groundwater diversion program operated by AngloGold.
- 4 7. The federal Clean Water Act (CWA) and the Nevada Water Pollution Control  
5 Law prohibit the discharge of pollutants from a point source into waters of the  
6 state except as authorized by permit. 33 U.S.C. § 1311(a); NRS 445A.465.
- 7 8. Nevada has received delegated authority to implement the requirements of the  
8 federal CWA within the State of Nevada. 57 Fed. Reg 5586, 5597 (August 10,  
9 1992) (NPDES Program delegated in 1975).
- 10 9. As part of its delegated authority, Nevada is required to provide for citizen  
11 participation in administrative and judicial review of state permitting actions. See  
12 33 U.S.C. § 1369(b)(1); 40 C.F.R. § 123.30.
- 13 10. Discharge permits must, among other things, regulate the discharge and enforce  
14 state established water quality standards. See e.g., NRS 445A.500(1); see also  
15 NRS 445A.525(1)(“effluent limitations shall be established and enforced for point  
16 sources”); NRS 445A.500(2) (discharge permits “must specify average and  
17 maximum daily or other appropriate quantitative limitations for the level of  
18 pollutants or contaminants in the authorized discharge”).
- 19 11. NDEP has expressly relied on WPCP NEV0087001 for regulation of the  
20 discharges from the Big Springs Mine. However, the permit does not regulate the  
21 discharges as required by state and federal law.
- 22 12. Accordingly, GBMW timely appealed NDEP's issuance of WPCP NEV0087001  
23 to the SEC on August 5, 2005 pursuant to NRS 445A.605(1), which provides the

1 right of appeal to “any person aggrieved by: (a) the issuance, denial, renewal,  
2 suspension or revocation of a permit; or (b) the issuance, modification or  
3 rescission of any other order.”

4 13. Prior to hearing the merits of the appeal , the SEC granted a motion by the State to  
5 dismiss the appeal for lack of standing based on a 2005 legislative amendment to  
6 the State Administrative Procedure Act (APA), NRS 233B.010 et seq.

7 14. The amendment, NRS 233B.127(4), provides that:

8 [e]xcept as otherwise provided in this subsection, a person must not be admitted  
9 as a party to an administrative proceeding in a contested case involving the grant,  
10 denial or renewal of a license unless he demonstrates to the satisfaction of the  
11 presiding hearing officer that:

12 (a) His financial situation is likely to be maintained or to improve as a direct  
13 result of the grant or renewal of the license; or

14 (b) His financial situation is likely to deteriorate as a direct result of the denial of  
15 the license or refusal to renew the license.

16 15. The SEC entered its Findings of Facts, Conclusions of Law and Order dismissing  
17 GBMW’s appeal on July 10, 2006, holding that a public interest group requesting  
18 a hearing from the SEC is required to meet the financial interest requirements of  
19 NRS 233B.127(4) and that those requirements apply retroactively to GBMW’s  
20 appeal, which was filed before the statute became effective. See SEC July 10,  
21 2006 Order. The SEC, therefore concluded that GBMW did not have standing to  
22 appeal NDEP’s renewal of WPCP NEV0087001 to the SEC.

23 16. GBMW now petitions this court for judicial review of the SEC’s decision to  
24 dismiss GBMW’s appeal for lack of standing pursuant to NRS 233B.127(4).

1 17. In the alternative, in the event that this Court finds that GBMW lacks standing to  
2 bring the underlying appeal before the SEC, GBMW asks this Court to review the  
3 merits of the underlying appeal via a writ of certiorari or mandamus.

4 **JURISDICTION AND VENUE**

5 18. The Administrative Procedure Act (APA), NRS 233B.010 et. seq. confers  
6 jurisdiction over this action.

7 19. The APA provides that “[a]ny party who is: (a) Identified as a party of record by  
8 an agency in an administrative proceeding; and (b) aggrieved by a final decision  
9 in a contested case, is entitled to judicial review of the decision.” NRS  
10 233B.130(1).

11 20. GBMW was the appellant below and, as is explained in more detail herein, is  
12 aggrieved by the SEC’s July 10, 2006 Order dismissing GBMW’s appeal, the  
13 AG’s June 19, 2006 Opinion the SEC relied upon, and NDEP’s actions as  
14 described in this Petition.

15 21. On July 25, 2006, GBMW filed a Petition for Reconsideration with the SEC. The  
16 SEC denied that Petition during a telephonic conference on August 4, 2006.

17 22. Venue is proper in the First Judicial District Court in and for Carson City pursuant  
18 to NRS 233B.130(2)(b). NDEP is located in Carson City.

19 23. If this court determines that the APA does not govern the SEC’s dismissal of  
20 GBMW’s appeal or if it determines that GBMW does not have standing to appeal  
21 NDEP’s renewal of WPCP NEV0087001 to the SEC, GBMW requests that this  
22 court review the SEC’s decision to dismiss and/or the merits of NDEP’s issuance

1 of WPCP NEV0087001 pursuant to a writ of certiorari, NRS 34.020 et. seq., or in  
2 the alternative, a petition for a writ of mandamus, NRS 34.160 et seq.

3 24. When a party seeks review in the district court of a ruling of an administrative  
4 agency not governed by the APA an extraordinary writ is the proper vehicle for  
5 seeking judicial review of the merits of the agency's actions. See Washington v.  
6 Clark County Liquor and Gaming Licensing Board, 110 Nev. 425, 428, 683 P.2d  
7 31, 33-34 (1984); Private Investigator's Licensing Board v. Atherly, 98 Nev. 514,  
8 515, 654 P.2d 1019, 1019-20 (1982) (treating an improper petition for judicial  
9 review pursuant to the APA as a petition for a writ of mandamus).

10 **PARTIES**

11 25. Petitioner Great Basin Mine Watch (GBMW) is a nonprofit organization based in  
12 Reno, Nevada.

13 26. GBMW was the appellant in the administrative proceeding and also commented  
14 on NDEP's actions during the permitting process. GBMW is, therefore, a party of  
15 record as required by the APA. NRS 233B.130(1)(a).

16 27. GBMW is aggrieved by the SEC's decision to dismiss GBMW's appeal for lack  
17 of standing and is likewise aggrieved by NDEP's issuance of WPCP  
18 NEV0087001.

19 28. GBMW is a nonprofit organization based in Reno, Nevada. Its members have  
20 used and enjoyed the NFHR, its tributaries, and the surrounding area that is  
21 affected by Permit NEV0087001 and the discharges from the Big Springs Mine  
22 for many years.

- 1 29. Members of GBMW use and enjoy the NFHR and the surrounding area for a  
2 variety of activities including, hiking, fishing, taking photographs, site seeing, and  
3 camping. These uses will be severely and adversely affected by the activities  
4 authorized by Water Pollution Control Permit NEV0087001.
- 5 30. GBMW's mission is to protect the people, land, air, water and wildlife of the  
6 Great Basin from destructive mining. To those ends, GBMW reviews and, where  
7 appropriate, comments on permitting decisions NDEP makes with regards to  
8 mining.
- 9 31. GBMW commented extensively on the renewal of WPCP NEV0087001 and  
10 subsequently appealed its renewal to the SEC.
- 11 32. Respondent Nevada Division of Environmental Protection (NDEP) is an agency  
12 of the Nevada Department of Conservation and Natural Resources. The Bureau  
13 of Mining Regulation and Reclamation is a branch of NDEP.
- 14 33. NDEP is responsible for enforcing Nevada's Water Pollution Control Law, NRS  
15 445A.300 et seq, and its implementing regulations.
- 16 34. NDEP is also responsible for enforcing the National Pollution Discharge  
17 Elimination System established by the Clean Water Act, 33 U.S.C. § 1311. 57  
18 Fed. Reg. 5586, 5597 (August 10, 1992).
- 19 35. NDEP was responsible for issuing and renewing WPCP NEV0087001.
- 20 36. Respondent State Environmental Commission (SEC) is a branch of NDEP. The  
21 SEC is an eleven member quasi-judicial agency that hears and decides contested  
22 cases and appeals regarding permitting decisions of NDEP. A three-member  
23 panel of the SEC was assigned to the underlying appeal.

1 37. The SEC’s jurisdiction is specifically prescribed by statute. NRS 445A.605(1)  
2 provides that:

3 1. Any person aggrieved by:

4 (a) The issuance, denial, renewal, suspension or revocation of a permit; or

5 (b) The issuance, modification or rescission of any other order,

6 by the Director may appeal to the Commission.

7 2. The Commission shall affirm, modify or reverse any action of the Director  
8 which is appealed to it.

9

10 38. The SEC’s regulations reiterate this right of appeal. NAC 445A.388 (“[a]ny  
11 person aggrieved by an action taken by the department pursuant to NAC  
12 445A.350 to NAC 445A.447, inclusive, may appeal to the Commission”).

13 39. Respondent AngloGold Ashanti (Nevada) Corporation (Anglogold),  
14 headquartered in Johannesburg, South Africa, owns the Big Springs Mine and is  
15 the permittee. According to its reports, Anglogold owns twenty-two operations  
16 around the world with combined proven and probable ore reserves of  
17 approximately seventy-nine million ounces (as of December 31, 2004).  
18 Anglogold requested and was granted intervention in the underlying SEC hearing.

19

**PROCEDURAL AND FACTUAL BACKGROUND**

20 27. WPCP NEV0087001 was first issued to Freeport-McMoran Gold Company in  
21 1987. Ownership of the project has changed several times since and was acquired  
22 by the current owner, Anglogold, in 1999.

1 28. Mining was conducted at the site from 1987 through August, 1993. Processing  
2 activities continued until October, 1994. Final reclamation and closure of the site  
3 began in 1995 and has since been ongoing.

4 29. NDEP published notice of its intent to issue the current renewal of WPCP  
5 NEV0087001 on March 2, 2005.

6 30. GBMW submitted comments on the draft permit on March 31, 2005.

7 31. NDEP issued the final permit, along with its response to GBMW's comments on  
8 July 26, 2005.

9 32. The permit became effective August 15, 2005 and will remain effective until  
10 August 15, 2010 unless it is modified, suspended or revoked.

11 33. GBMW timely filed the underlying request for an appeal hearing before the SEC  
12 on August 5, 2005. See NAC 445B.890 (requiring that a notice of appeal be filed  
13 "within ten days after notice of the action").

14 34. GBMW filed its appeal with the SEC pursuant to NRS 445A.605(1), which  
15 provides that "any aggrieved person" may appeal a permit issued by NDEP to the  
16 SEC.

17 35. AngloGold filed a petition to intervene in the underlying appeal on August 15,  
18 2005. GBMW did not oppose AngloGold's intervention. The SEC granted  
19 AngloGold's request for intervention on August 31, 2005.

20 36. In its appeal, GBMW challenged NDEP's renewal of Permit NEV0087001  
21 because: (1) the mine is discharging pollutants into waters of the state from  
22 several point sources, yet NDEP has not issued a proper discharge permit for the  
23 mine as required by federal and state law; (2) the mine is causing exceedances of

1 water quality standards in the NFHR and its tributaries in violation of state and  
2 federal law; (3) NDEP has not, as required by federal law, established total  
3 maximum daily loads (TMDLs) for the NFHR and its tributaries and cannot allow  
4 discharges into these waters until it does; (4) the mine's discharges are causing  
5 elevated levels of selenium in LCT species in the NFHR and, therefore,  
6 constitutes an impermissible take under the federal Endangered Species Act; (5)  
7 the mine's pit lakes are causing exceedances of drinking water standards in  
8 groundwater in violation of state law; and (6) the groundwater diversion program  
9 is discharging water that violates arsenic standards into the shallow groundwater  
10 aquifer in the Sammy Creek drainage in violation of state law.

11 37. The SEC scheduled the requested appeal hearing for March 29 and 30, 2006.

12 38. One week prior to the scheduled hearing, on March 22, 2006, NDEP submitted  
13 notice of its intent to challenge GBMW's standing to bring the appeal. NDEP  
14 argued that according to NRS 233B.127(4), an amendment to the Nevada APA  
15 passed during the 2005 legislative session, GBMW could not appeal NDEP's  
16 renewal of WPCP NEV0087001 to the SEC because it does not have a financial  
17 interest in issuance of the permit.

18 39. GBMW filed an opposition to NDEP's motion to dismiss on March 29, 2006.

19 40. At the start of the hearing on March 29, 2006, upon hearing argument from all  
20 parties regarding the state's motion to dismiss, the SEC determined to request an  
21 official opinion regarding the applicability of NRS 233B.127(4) to GBMW's  
22 requested appeal hearing from the Attorney General (AG)'s Office and to stay the  
23 underlying hearing pending issuance of the opinion.

1 41. The SEC then rescheduled GBMW's appeal hearing for July 6, 2006.

2 42. On June 19, 2006, the AG's Office issued the requested opinion. The AG's  
3 Opinion essentially agreed with the arguments made by the deputy Attorney  
4 General for NDEP before the Commission and held that: (1) "NRS 233B.127(4)  
5 requires a public interest group to demonstrate a financial interest as a direct  
6 result of a grant or renewal of a license in order to appeal that grant or renewal to  
7 the State Environmental Commission;" (2) "Under Nevada law a 'permit' is  
8 substantially similar to a "license" for purposes of NRS 233B.127(4);" (3) "The  
9 restrictions outlined in NRS 233B.127(4) apply to an appeal filed with the State  
10 Environmental Commission prior to the effective date of that statutory provision,  
11 but where the actual hearing on the matter occurs after its effective date;" and (4)  
12 "The State Environmental Commission has jurisdiction to hear appeals regarding  
13 the grant or denial of a water quality permit pursuant to the terms of NRS  
14 445A.605(1), but it must do so in harmony with the jurisdictional limitations  
15 outlined in NRS 233B.127(4)." June 19, 2006 Attorney General's (AG's)  
16 Opinion (AGO).

17 43. The SEC reconvened on July 6, 2006, and upon brief argument by the parties,  
18 adopted the AGO, granted the State's motion, and dismissed GBMW's appeal.

19 44. On July 10, 2006, the SEC entered its Findings of Facts, Conclusions of Law and  
20 Order, relying on the AG's opinion and dismissing GBMW's appeal. The SEC  
21 held that that a public interest group requesting a hearing from the SEC is  
22 required to meet the financial interest requirements of NRS 233B.127(4) and that  
23 those requirements apply retroactively to GBMW's appeal, which was filed before

1 the statute became effective. See SEC July 10, 2006 Order (attached). The SEC,  
2 therefore concluded that GBMW did not have standing to appeal NDEP's renewal  
3 of WPCP NEV0087001 to the SEC.

4 45. On July 7, 2006 a coalition of concerned citizens and organizations filed a petition  
5 with the United States EPA to revoke Nevada's delegated authority to implement  
6 the CWA (and the CAA) because NDEP is not authorized by those acts to exclude  
7 those with non-pecuniary interests from appealing NDEP issued permits.

8 46. On July 25, 2006, GBMW filed a Petition for Reconsideration with the SEC. The  
9 SEC denied that Petition during a telephonic conference on August 4, 2006.

10 47. GBMW now timely files this petition for judicial review and alternative request  
11 for extraordinary writ relief.

#### 12 **FIRST CAUSE OF ACTION**

#### 13 **THE SEC'S DECISION TO DISMISS GBMW'S APPEAL UNLAWFULLY,** 14 **UNREASONABLY AND ERRONEOUSLY RELIED UPON THE PLAIN** 15 **LANGUAGE OF NRS 233B.127(4)** 16

17  
18 48. Paragraphs 1-47 are reasserted and reincorporated as if fully stated herein.

19 49. The SEC relied upon the AGO to dismiss GBMW's underlying appeal of WPCP  
20 NEV0087001.

21 50. The AGO erroneously relies upon a plain language approach to interpreting NRS  
22 233B.127(4). AGO, at 2.

23 51. In general, the plain language approach to statutory interpretation is appropriate  
24 where a statute is clear and unambiguous on its face.

25 52. Here, the plain language of NRS 233B.127(4) is not sufficient to ascertain the  
26 statutory intent of NRS 233B.127(4) because: (1) the statute is not clear and

1 unambiguous on its face; (2) the plain language interpretation has absurd and  
2 impracticable results, and; (3) the plain language approach yields a statute of  
3 questionable validity.

4 53. NRS 233B.127(4) is not clear and unambiguous. NRS 233B.127(4) purportedly  
5 identifies three classes of individuals that may challenge an agency's decision -  
6 those that can demonstrate that:

7 (a) His financial situation is likely to be **maintained or to improve** as a direct  
8 result of the **grant or renewal** of the license; or

9  
10 (b) His financial situation is likely to **deteriorate** as a direct result of the **denial**  
11 of the license or refusal to renew the license.

12  
13 NRS 233B.127(4)(emphasis added).

14 54. Upon close review, however, the statute does not in fact protect three separate  
15 classes of people; rather, it only protects those with a neutral or positively  
16 correlated financial interest in the underlying license. Far from being clear and  
17 unambiguous, then, the statute is redundant as it essentially names the same group  
18 twice; unclear as to who it intends to protect (i.e., did the legislature intend to  
19 preclude those who would suffer financial harm from issuance of a license from  
20 challenging the license?); and, misleading in that it suggests, at first blush, that the  
21 right of appeal is preserved for those that suffer financial harm from issuance of a  
22 license.

23 55. Notably, even the AG misread the statute, as he incorrectly concluded that, NRS  
24 233B.127(4) "requires a public interest group to demonstrate a *financial interest*  
25 as a direct result of a grant or renewal of a license in order to appeal that grant or  
26 renewal to the State Environmental Commission." AGO, at 2 (emphasis added).

1 To the contrary, the plain language only provides the right to appeal issuance of a  
2 permit to those who are financially unaffected or stand to financially benefit from  
3 issuance of the permit.

4 56. NRS 233B.127(4) is, therefore, ambiguous, unclear, and the plain language  
5 approach to statutory interpretation was inappropriate, or at least, insufficient to  
6 ascertain its intent.

7 57. Even if the statute were plain and clear, the SEC was permitted, and in fact  
8 required, to go beyond the statute's plain language to ascertain its intent because  
9 the plain language leads to absurd, impracticable, and unreasonable consequences.

10 58. According to the plain language of NRS 233B.127(4), the only people who can  
11 challenge the issuance of a license are those that will see no change to their  
12 financial position or will financially benefit from its issuance. To be clear, those  
13 that stand to financially lose if the permit is denied may challenge the denial.  
14 However, the same right is not afforded to those who stand to financially lose if  
15 the permit is granted. Under what scenario would an individual who benefits  
16 from issuance of a license, challenge the issuance of that license? The parameters  
17 established by the plain language of NRS 233B.127(4) are absurd and would  
18 essentially obliterate any administrative review of agency issued licenses.

19 59. Likewise, it is well-established that if the plain language of a statute yields a  
20 result that is of questionable constitutional or legal validity, a strict plain language  
21 reading of the statute should be rejected. Here, as is explained in paragraphs  
22 twenty through twenty-seven, the plain language of the statute renders a result  
23 that is unconstitutional and in violation of federal law.

1 60. Therefore, despite the general presumption in favor of interpreting statutes based  
2 on their plain language, the SEC's and AG's reliance on the plain language of  
3 NRS 233B.127(4) to ascertain its intent was erroneous, unreasonable, based on  
4 mistaken conclusions of law and fact, and arbitrary and capricious.

5 **SECOND CAUSE OF ACTION**

6  
7 **THE SEC'S APPLICATION OF NRS 233B.127(4) TO LIMIT APPEALS TO**  
8 **THE SEC IS NOT SUPPORTED BY THE LEGISLATIVE HISTORY**  
9

10 61. Paragraphs 1-60 are reasserted and reincorporated as if fully stated herein.

11 62. Because NRS 233B.127(4) is not clear and unambiguous on its face, the SEC and  
12 the AG were required to look to the legislative history to ascertain its intent.

13 63. The legislative history, when taken as a whole, does not support the SEC's  
14 interpretation and application of NRS 233B.127(4) to limit the right of public  
15 interest groups to appeal NDEP's permitting decisions to the SEC.

16 64. The legislative history focuses almost entirely on private licensing proceedings,  
17 such as proceedings before the Pharmacy Board, Workers Compensation Board,  
18 the State Board of Nursing, or the Industrial Insurance process.

19 65. The legislative history also indicates that the legislature did not intend to impose  
20 any additional standing limitations, but merely to codify preexisting standards that  
21 had already been informally adopted by decision-making bodies to determine  
22 standing. See Hearing on SB 428, Before the Assembly Committee on  
23 Government Affairs, 2005 Leg., 73<sup>rd</sup> Sess. 13 (May 20, 2005).

24 66. The preexisting practice of state agencies has never been to limit standing to those  
25 with a positive financial interest, but rather to broadly grant standing to all those  
26 with legitimate interests, financial, positive or negative, and non-financial alike.

1 67. Prior to implementation of NRS 233B.127(4) the SEC, by statute, heard appeals  
2 from “any aggrieved person.” NRS 445A.605(1). The courts have interpreted  
3 the term “aggrieved person” to include those with any legitimate, substantial  
4 interest, not merely financial interests.

5 68. The SEC’s and AG’s reliance upon the plain language of NRS 233B.127(4) to  
6 limit the right of the public to appeal NDEP decisions to the SEC is, therefore, not  
7 supported by the legislative history of the statute and is unlawful, unreasonable,  
8 based on erroneous conclusions of law or mistaken fact, and arbitrary and  
9 capricious.

10 **THIRD CAUSE OF ACTION**

11  
12 **THE SEC ERRONEOUSLY CONCLUDED THAT NRS 233B.127(4)**  
13 **SUPERCEDES AND LIMITS THE SEC’S SEPARATE STATUTORY RIGHT**  
14 **TO HEAR APPEALS BY “ANY AGGRIEVED PERSON”**

15  
16 69. Paragraphs 1-68 are reasserted and reincorporated as if fully stated herein.

17 70. Nevada’s Water Pollution Control Law specifically and separately establishes the  
18 right of appeal to the SEC for “any person aggrieved by: (a) the issuance, denial,  
19 renewal, suspension or revocation of a permit; or (b) the issuance, modification or  
20 rescission of any other order.” NRS 445A.605(1).

21 71. The SEC’s own regulations reiterate this right of appeal. NAC 445A.388 (“[a]ny  
22 person aggrieved by an action taken by the department pursuant to NAC  
23 445A.350 to NAC 445A.447, inclusive, may appeal to the Commission”).

24 72. The Attorney General’s Opinion incorrectly concludes that NRS 233B.127(4)  
25 limits the boarder grant of jurisdiction to the SEC previously and separately  
26 established by the legislature. AGO, at 4-6.

1 73. The APA, by its plain terms, does not supersede or abrogate other jurisdictional  
2 statutes that apply to specific agencies. The APA expressly provides that,  
3 The provisions of this chapter are intended to supplement statutes applicable to  
4 specific agencies. This chapter does not abrogate or limit additional requirements  
5 imposed on such agencies by statute or otherwise recognized by law.  
6  
7 NRS 233B.020(2).

8 74. It is also a well-accepted canon of statutory construction that when two statutory  
9 provisions are in conflict, the more specific of the two should apply. Despite  
10 NRS 233B.127(4), the provision of Nevada’s Water Pollution Control Law that  
11 specifically defines the SEC’s jurisdiction is plainly more specific and narrow  
12 than the general jurisdictional limits prescribed by the APA and should, therefore,  
13 prevail.

14 75. It is also well accepted that that when two statutory provisions are in conflict,  
15 there is an obligation to, as possible, render them compatible with each other and  
16 to avoid an interpretation that renders any language mere surplusage. The  
17 interpretation adopted by the SEC does not comport with that mandate as it  
18 renders the SEC’s own jurisdictional statute, NRS 445A.605, meaningless.

19 76. The SEC’s and AG’s conclusion that NRS 233B.127(4) limits the SEC’s  
20 preexisting statutory right to hear appeals from any aggrieved person is, therefore,  
21 unlawful, unreasonable, based on erroneous conclusions of law or mistaken fact,  
22 and arbitrary and capricious.

23 **FOURTH CAUSE OF ACTION**

24  
25 **THE SEC ERRONEOUSLY CONCLUDED THAT NRS 233B.127(4) APPLIES**  
26 **TO THE UNDERLYING APPEAL HEARING REQUESTED BY GBMW,**  
27 **WHICH IS NOT A CONTESTED CASE**  
28

1 77. Paragraphs 1-78 are reasserted and reincorporated as if fully stated herein.

2 78. NRS 233B.127(4) expressly applies only to “contested cases.”

3 79. A contested case is defined by the APA as “a proceeding, including but not  
4 restricted to rate making and licensing, in which the legal rights, duties or  
5 privileges of a party are required by law to be determined by an agency after an  
6 opportunity for hearing, or in which an administrative penalty may be imposed.”  
7 NRS 233B.032.

8 80. As such, NRS 233B.127(4) only applies to hearings that are either: (a) required to  
9 be held by the agency prior to determining the legal rights, duties or privileges of  
10 a party; or (b) a proceeding that may result in the imposition of an administrative  
11 penalty.

12 81. Here, the underlying appeal hearing does not fall into either of these categories  
13 and is, therefore, not a contested case governed by NRS 233B.127(4).

14 82. GBMW filed its appeal of WPCP NEV0087001 with the SEC pursuant to NRS  
15 445A.605, which provides, that upon holding the appeal hearing, the  
16 Commission “shall affirm, modify or reverse any action of the Director which is  
17 appealed to it.” By the plain terms of the statute, the SEC, upon holding the  
18 requested hearing, is not authorized to impose an administrative penalty. The  
19 SEC, can only affirm, modify or reverse the challenged permit.

20 83. Likewise, the SEC was not required by law to hold the requested appeal hearing  
21 before determining the rights and duties of the parties, but rather, was only  
22 required to hold the appeal hearing because GBMW requested the hearing. The  
23 Nevada Supreme Court has held that a hearing conducted pursuant to the sort of

1 permissive language found in NRS 445A.605(1), providing that an aggrieved  
2 person “may appeal,” does not constitute a “contested matter where the legal  
3 rights, duties and privileges of the parties must be determined”. Nevada State  
4 Purchasing Division v. Georges Equipment Company, Inc., 105 Nev. 798, 803-4  
5 (1989).

6 84. As such, the appeal hearing GBMW requested was not a contested case and the  
7 SEC and AG erred by applying NRS 233B.127(4) to the requested hearing. The  
8 SEC’s application of NRS 233B.127(4) to the underlying appeal hearing was,  
9 therefore, unlawful, unreasonable, based on erroneous conclusions of law or  
10 mistaken fact, and arbitrary and capricious.

11 **FIFTH CAUSE OF ACTION**

12  
13 **THE SEC ERRONEOUSLY CONCLUDED THAT NRS 233B.127(4) APPLIES**  
14 **RETROACTIVELY TO THE APPEAL HEARING REQUESTED BY GBMW**  
15

16 85. Paragraphs 1-84 are reasserted and reincorporated as if fully stated herein.

17 86. The SEC and the AG determined that NRS 233B.127(4) should apply  
18 retroactively to GBMW’s appeal.

19 87. In general, as acknowledged by the AG in its opinion, there is a strong  
20 presumption against the retroactive application of statutes. AGO, 3. That  
21 general preemption notwithstanding, the AG asserted that where a statute  
22 merely relates to remedies and modes of procedure it should apply retroactively.  
23 AGO 3-4. According to that exception, the AG and the SEC concluded that, NRS  
24 233B.127(4) should apply retroactively to the underlying appeal hearing GBMW  
25 requested.

1 88. Contrary to the AG's and the SEC's Opinion, such an exception to the rule  
2 against retroactive application for statutes that relate solely to remedies and  
3 modes of procedure does not exist. To the contrary, the Nevada courts have  
4 indicated that statutes will only apply retroactively where the legislature evinces a  
5 clear intent that they should. In addition, in several cases involving rules  
6 regarding remedies and modes of procedure, the Nevada Supreme Court has ruled  
7 against retroactivity.

889. The SEC's and AG's conclusion that NRS 233B.127(4) applies retroactively to  
9 bar GBMW's appeal is, therefore, unlawful, unreasonable, based on erroneous  
10 conclusions of law or mistaken fact, and arbitrary and capricious.

11 **SIXTH CAUSE OF ACTION**

12 **THE SEC'S DECISION TO BAR GBMW'S APPEAL**  
13 **VIOLATES FEDERAL LAW**

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15  
16 90. Paragraphs 1-90 are reasserted and reincorporated as if fully stated herein.

17 91. The United States Environmental Protection Agency (EPA) has delegated the  
18 authority to implement the federal Clean Water Act (CWA) to the State of  
19 Nevada. See 57 Fed. Reg 5586, 5597 (August 10, 1992) (NPDES Program  
20 delegated in 1975).

21 92. Under this delegated authority, NDEP is responsible for implementing the federal  
22 CWA requirements within the state via the development of its own programs and  
23 the issuance of permits in accordance with those programs. See e.g., 33 U.S.C. §  
24 1342(b) (The CWA authorizes states to establish their own permitting programs  
25 consistent with federal law).

- 1 93. As a condition precedent to this delegated authority, Nevada's programs must  
2 meet certain minimum criteria set forth in the federal acts and their regulations.  
3 See, 33 U.S.C. § 1342(b). If Nevada's programs fail to meet these minimum  
4 requirements EPA may withdraw Nevada's delegated authority and resume  
5 federal implementation of the CWA within the State. 33 U.S.C. § 1342(c)(2)-(3).
- 6 94. Preeminent among the requirements a state's program must meet, is the  
7 requirement that a state provide for citizen participation in administrative and  
8 judicial review of state permitting actions. See 33 U.S.C. § 1369(b)(1); 40 C.F.R.  
9 § 123.30.
- 10 95. EPA has consistently interpreted these requirements to mean that a state must  
11 provide for standing in the judicial review of permitting decisions that is at least  
12 as broad as the federal court standing requirements under Article III of the United  
13 States Constitution.
- 14 96. Article III does not require a showing of financial harm; rather, injury to health,  
15 aesthetic, environmental, or recreational interests is sufficient to confer standing.
- 16 97. State programs that do not provide for this requisite level of judicial review are  
17 unlawful. EPA's rules under the CWA specifically provide that:
- 18 All States that administer or seek to administer a program under this part shall  
19 provide an opportunity for judicial review in State Court of the final approval or  
20 denial of permits by the State that is sufficient to provide for, encourage, and  
21 assist public participation in the permitting process. A State will meet this  
22 standard if State law allows an opportunity for judicial review that is the same as  
23 that available to obtain judicial review in federal court of a federally-issued  
24 NPDES permit . . . . A state will not meet this standard if it narrowly restricts the  
25 class of person who may challenge the approval or denial of permits (for example,  
26 if only the permittee can obtain judicial review, if persons must demonstrate  
27 injury to a pecuniary interest in order to obtain judicial review, or if persons must  
28 have a property interest in close proximity to a discharge of surface waters in  
29 order to obtain judicial review).

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40 CFR § 123.30.

98. 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, before the SEC.
99. 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”).
100. 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.
101. Such a barrier to judicial review is unlawful under the CWA. The SEC’s decision is, therefore, in violation of federal law and Nevada’s delegated authority to implement the CWA and is unlawful, unreasonable, based on erroneous conclusions of law or mistaken fact, and arbitrary and capricious.

**SEVENTH CAUSE OF ACTION**

**THE SEC’S DECISION TO BAR GBMW’S APPEAL IS  
UNCONSTITUTIONAL**

102. Paragraphs 1-101 are reasserted and reincorporated as if fully stated herein.

103. The SEC’s interpretation and application of NRS 233B.127(4) violates the Equal Protection and Due Process clauses of the Fourteenth Amendment; and the First Amendment of the United States Constitution, which provides for the freedom of speech and the right to petition the government for grievances.

104. 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 The Fourteenth Amendment requires equal protection and application of law and that, at a minimum, a statutory classification be rationally related to a legitimate governmental purpose.

105. 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. Neither distinction is rationally related to a legitimate government purpose.

106. To the contrary, the legislative history indicates that the legislature never intended to distinguish between those with a financial benefit and those facing financial

1 harm. In fact, the phrase “financial interest” is used repeatedly throughout the  
2 legislative history indicating that the statute was intended to grant standing to  
3 those with a financial interest, positive or negative, in an agency’s decision.

4 107. In addition, the classification between financial winners and financial losers is  
5 clearly arbitrary - why would someone who stands to benefit from an agency’s  
6 issuance of a permit, challenge that permit? The simple answer is, they would not.  
7 The effect of the statute, then, is to grant the right of administrative and judicial  
8 review only to those individuals who would have no interest in or need to seek  
9 review while excluding those who would.

10 108. The AG’s opinion and the legislative history suggests that, at best, the distinction  
11 between those with pecuniary interests versus those with other, non-pecuniary  
12 interests was politically motivated to exclude public interest groups like GBMW  
13 from appealing agency decisions. For example, the AGO concludes that the  
14 legislative intent of NRS 233B.127(4) was to “limit the participation of public  
15 interest groups in the administrative hearing process.” AGO, at 5. A  
16 classification that is motivated by animosity towards a particular, politically  
17 unpopular class, lacks a rational basis and is unconstitutional.

18 109. The Fourteenth Amendment also provides for the protection of substantive and  
19 procedural due process. Specifically, it provides that no State shall “deprive any  
20 person of life, liberty, or property, without due process of law.” U.S. Const.  
21 Amend. XIV. §1.

22 110. In this case, NRS 233B.127(4) violates both substantive and procedural due  
23 process because, according to the statute, persons whose property or health is

1 harmed by an agency’s issuance of a permit do not have the right to challenge the  
2 permit and would, therefore, suffer procedural and substantive harm to their  
3 vested rights in violation of the Due Process Clause of the United States  
4 Constitution.

5 111. The Supremacy Clause of the United States Constitution provides that:

6 This [the U.S.] Constitution, and the laws of the United States which shall be  
7 made in Pursuance thereof; and all Treaties made, or which shall be made, under  
8 the authority of the United States, shall be Supreme Law of the land; and the  
9 Judges in every state shall be bound thereby, any thing in the Constitution or  
10 Laws of any state to the contrary notwithstanding.

11  
12

U.S. Const. Art. VI ¶ 2.

13 112. The Nevada Constitution likewise provides that, the paramount allegiance of

14 every citizen is due to the Federal Government in the exercise of all its

15 Constitutional powers as the same have been or may be defined by the Supreme

16 Court of the United States and no power exists in the people of this or any other

17 State of the Federal Union to dissolve their connection therewith or perform any

18 act tending to impair [,] subvert, or resist the Supreme Authority of the

19 government of the United States. Nev. Const. Art. 1, § 2.

20 113. Because federal law is the “supreme law of the land,” when there is a conflict

21 between a state law and a federal law, the federal law trumps, or preempts, the

22 state law, not vice-a-versa.

23 114. Here, the SEC’s interpretation of NRS 233B.127(4) interferes with the scheme

24 established by Congress providing for citizen enforcement of certain

25 environmental laws. As explained, the CWA requires a certain level of citizen

1 involvement in enforcement, as well as access to administrative and judicial  
2 review of decisions rendered pursuant to those acts.

3 115. The SEC’s decision to deny citizens’ access to administrative and judicial review  
4 of NDEP’s permitting decisions, included those made under the CWA, clearly  
5 goes against the intent of the CWA and prevents its full implementation as  
6 intended by Congress. The SEC’s decision to apply NRS 233B.127(4) to limit  
7 administrative appeals before the SEC, therefore, constitutes impermissible  
8 preemption of federal law and is unreasonable, based on erroneous conclusions of  
9 law or mistaken fact, and arbitrary and capricious.

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

19 117. The Freedom of Speech protected by the First Amendment includes advocacy  
20 against governmental intrusions via litigation. The SEC’s decision will have an  
21 unconstitutional, chilling effect on lawful, zealous advocacy and is, therefore,  
22 unconstitutional. See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 234  
23 (2002).

1 118. The First Amendment of the United States Constitution likewise protects an  
2 individual's right to petition the government for a redress of grievances. U.S.C.A.  
3 Const. Amend. 1. The right to access the courts is one aspect of this right.  
4 Administrative and judicial review are often the only avenues open for citizens to  
5 obtain redress of governmental grievances. As such, the State's interpretation of  
6 NRS 233B.127(4) to exclude those seeking to redress financial and non-financial  
7 grievances with NDEP permitting decisions, violates the Right to Petition and is  
8 unconstitutional.

9 119. For these reasons, the SEC's interpretation and application of NRS 233B.127(4)  
10 is unconstitutional, unreasonable, based on erroneous conclusions of law or  
11 mistaken fact, and arbitrary and capricious.

12 **EIGHTH CAUSE OF ACTION**

13  
14 **NDEP'S ISSUANCE OF WPCP NEV0087001 VIOLATES**  
15 **STATE AND FEDERAL LAW**

16  
17 120. Paragraphs 1-119 are reasserted and reincorporated as if fully stated herein.

18 121. In the event that this Court finds that NRS 233B.127(4) applies to GBMW's  
19 request for the underlying appeal hearing and that, according to NRS  
20 233B.127(4), GBMW lacks standing to appeal NDEP's issuance of WPCP  
21 NEV0087001, GBMW requests that this Court issue a writ of certiorari, NRS  
22 34.020 et. seq., or mandamus, NRS 34.160 et seq., to review the merits of  
23 NDEP's issuance of the underlying permit.

24 122. When a party seeks review in the district court of a ruling of an administrative  
25 agency not governed by the APA an extraordinary writ is the proper vehicle for  
26 seeking judicial review of the merits of the agency's actions. See Washington v.

1           Clark County Liquor and Gaming Licensing Board, 110 Nev. 425, 428, 683 P.2d  
2           31, 33-34 (1984); See Private Investigator's, 98. Nev. at 515, 654 P.2d at 1020  
3           (treating an improper petition for judicial review pursuant to the APA as a petition  
4           for a writ of mandamus).

5   123.   The federal Clean Water Act (CWA) and the Nevada Water Pollution Control  
6           Law provides that is unlawful for any person “to discharge from any point source  
7           any pollutant into any waters of the state” without a permit. NRS  
8           445A.465(1)(a); see also 33 U.S.C. § 1311(a). The Big Springs Mine is  
9           discharging pollutants into waters of the state, the NFHR and its tributaries, from  
10          several sources, including six rock disposal areas (RDAs) that were constructed in  
11          preexisting drainages and have not been moved or reclaimed; two open pits, and a  
12          groundwater diversion program Anglogold is operating to divert arsenic laden  
13          groundwater from upgradient of the open pits to the shallow aquifer adjacent to  
14          Sammy Creek, a tributary of the NFHR.

15   124.   GBMW raised this issue in its comments to NDEP on its draft NEV0087001  
16          permit. In response, NDEP explained that “[f]lows from the RDA’s and pit lake  
17          are regulated under this Water Pollution Control Permit.” However, this permit  
18          does not adequately regulate the discharge or constitute a proper discharge permit  
19          as required by State and Federal Law.

20   125.   NDEP as required by federal and state law, has established water quality  
21          standards for the NFHR and its tributaries. See NRS 445A.530 (requiring the  
22          establishment of water quality standards); 33 USC 1313(a)-(c) (same); NAC  
23          445A.124 (class A standards); NAC 445A.124(4)(listing the NFHR and its

1 tributaries as class A waters). Discharges are required by federal and state law to  
2 comply with water quality standards and it is unlawful to allow a discharge that  
3 does not comply with water quality standards. See NRS 445A.525(1)(“[e]ffluent  
4 limitations shall be established and enforced for point sources”); NRS 445A.530  
5 (“[i]f more stringent limitations are needed, including those necessary to meet  
6 water quality standards . . . such limitations shall be established and enforced”);  
7 NRS 445A.490 (No permit may be issued which authorizes any discharge . . . in  
8 to any waters of the state . . . which the director determines is inconsistent with  
9 the regulations or guidelines adopted by the commission pursuant to NRS  
10 445A.300 to 445A.730, including those relating to standards of water quality.”);  
11 NRS 445A.500 (Each permit issued by the department must ensure compliance  
12 with “effluent limitations” and “any more stringent limitation including any  
13 necessary to meet or effectuate standards of water quality”).

14 126. Here, the discharges from the Big Springs Mine are causing exceedances of water  
15 quality standards in the NFHR and its tributaries in violation of state and federal  
16 law, including but not limited to those for selenium, total dissolved solids (or  
17 salts), manganese and arsenic. WPCP NEV0087001 permits the discharge to  
18 continue, yet fails to require compliance with the applicable water quality  
19 standards.

20 127. The CWA also requires states to identify water bodies that cannot meet  
21 established water quality standards. 33 U.S.C. § 1313(d)(1)(A). These waters  
22 are then listed on the State’s 303(d) list of impaired waters as water quality  
23 limited streams, or WQLS. Once waters have been listed on the 303(d) list, the

1 state is required to formulate a total maximum daily load (TMDL) for the water  
2 body. 33 U.S.C. § 1311(d)(1)(c); Friends of the Wild Swan v. United States  
3 Environmental Protection Agency, 130 F.Supp.2d 1199, 1200 (2000). The  
4 TMDL represents the water's capacity to tolerate combined sources of pollution  
5 while meeting establish water quality standards. 33 U.S.C. § 1313(d)(1)(c).

6 128. All of the waters affected by the Big Springs Mine are already listed on the  
7 State's 303(d) list, yet NDEP has failed to establish TMDLs for the receiving  
8 waters. NDEP's failure to establish TMDLs for the NFHR and its tributaries  
9 violates the CWA.

10 129. The CWA not only requires the establishment of TMDLs, but prohibits any  
11 discharges into an impaired water until all necessary TMDLS have been  
12 established. NDEP is continuing to allow the Big Springs Mine to discharge into  
13 the NFHR and its tributaries, despite its failure to establish TMDLs for the  
14 impacted receiving waters in violation of the CWA.

15 130. The discharges are adversely affecting Lahontan Cutthroat Trout (LCT) species in  
16 the NFHR in violation of the federal Endangered Species Act. The federal  
17 Endangered Species Act (ESA), in relevant part, provides that it is unlawful for  
18 any person to take an endangered species of fish or wildlife. 16 U.S.C.  
19 1536(a)(2). The Fish and Wildlife Service's regulations apply the take  
20 prohibition to both endangered and threatened species of fish and wildlife. 50  
21 CFR 17.31(a). The NFHR is home to Lahontan Cutthroat Trout, a federally  
22 recognized threatened species that is protected by the ESA.

1 131. Take is defined broadly as meaning “to harass, harm, pursue, hunt, shoot, wound,  
2 kill, trap, capture, or collect, or to attempt to engage in such conduct.” 16 USC  
3 1532(19). Harass, in turn, is defined as “an intentional or negligent act or  
4 omission which creates the likelihood on injury to wildlife by annoying it to such  
5 an extent as to significantly disrupt normal behavioral patterns, which include but  
6 are not limited to breeding, feeding or sheltering.” 50 CFR 17.3. Harm, in turn,  
7 has been defined as “an act which actually kills or injures wildlife. Such act may  
8 include significant habitat modification or degradation where it actually kills or  
9 injures wildlife by significantly impairing essential behavioral patterns, including  
10 breeding, feeding or sheltering.” 50 CFR 17.3.

11 132. The data indicates, and NDEP does not dispute, that the Big Springs Mine is  
12 causing elevated levels of selenium to occur in the NFHR and its tributaries in  
13 exceedance of the established aquatic life standard for selenium. The data also  
14 indicates that LCT in the NFRH are showing elevated levels of selenium in their  
15 tissue. Selenium is recognized by the state to be a toxic material. See NAC  
16 445A.144.

17 133. Two open pits, the SWX and 303 pits, at the site have not been backfilled and  
18 continue to discharge to ground and surface water. The SWX and 303 pits are  
19 flow-through pits that have elevated levels of manganese, sulfates and TDS.  
20 Because the pits are flow through systems, water flows out of the pits into the  
21 surrounding bedrock and ultimately into the NFHR and its tributaries.

22 134. Nevada law provides that  
23 Bodies of water which are a result of mine pits penetrating the water table must  
24 not create an impoundment which: (a) has the potential to degrade the

1 groundwater of the state; or (b)has the potential to affect adversely the health of  
2 human, terrestrial or avian life.

3  
4 NAC 445A.429(3).

5 135. WPCP NEV0087001does not prevent the ongoing discharges of pollutants to  
6 ground and surface waters from the SWX and 303 pits in violation of Nevada law.

7 136. AngloGold is also diverting groundwater from up gradient of the pit lakes to the  
8 shallow alluvial aquifer adjacent to Sammy Creek. See supra, 19-20. The  
9 diverted water consistently exceeds Nevada’s drinking water standard for arsenic.

10 137. NDEP’s regulations provide that no mining facility may degrade waters of the  
11 state. NAC 445A.424. Degrade is defined in relevant part as lowering the quality  
12 of groundwater below drinking water standards. NAC 445A.424. WPCP  
13 NEV0087001 permits the ongoing discharge of the arsenic laden groundwater to  
14 the alluvial aquifer of Sammy Creek in violation of state law.

15 138. For these reasons, NDEP’s renewal of WPCP NEV0087001 is in violation of  
16 Nevada and federal law, unreasonable, based on erroneous conclusions of law or  
17 mistaken fact, and arbitrary and capricious.

18 **PRAYER FOR RELIEF**

19 Based on the foregoing, the SEC’s July 10, 2006 Order, the AG’s June 19, 2006  
20 Opinion, and NDEP’s renewal of the underlying WPCP NEV0087001, are in violation of  
21 statutory and regulatory provisions, unreasonable, based on erroneous conclusions of law  
22 and mistaken fact, clearly erroneous in view of the reliable, probative, and substantive  
23 evidence, and arbitrary and capricious. GBMW therefore respectfully requests the  
24 following relief:

- 1 1. That this court set aside the SEC's July 10, 2006 Order dismissing GBMW's  
2 appeal for lack of standing and the underlying June 19, 2006 AG's Opinion;
- 3 2. That this court, via a writ of certiorari and mandamus, review the merits of the  
4 underlying matter and set aside and remand WPCP NEV0087001 to NDEP with  
5 instructions to comply with all statutory and regulatory provisions;
- 6 3. That this court issue an order declaring that:
  - 7 A. The plain language of NRS 233B.127(4 ) is not sufficient to glean the statute's  
8 intent because it is unclear and ambiguous, and the plain language would lead  
9 to absurd impracticable results of questionable legal and constitutional  
10 validity;
  - 11 B. The legislative history, as a whole. indicates that the legislature did not intend  
12 NRS 233B.127(4) to limit appeals of NDEP issued permits to those with a  
13 neutral or positively correlated financial interest in the permit;
  - 14 C. NRS 233B.127(4) does not supersede or limit the SEC's separate and specific  
15 statutory right, provided by NRS 445A.605(1), to hear appeals from "any  
16 aggrieved person."
  - 17 D. NRS 233B.127(4) does not apply to GBMW's underlying request for an  
18 appeal hearing because it is not a contested case;
  - 19 E. NRS 233B.127(4) does not apply retroactively to GBMW's request for the  
20 underlying appeal hearing ;
  - 21 F. The SEC's decision to dismiss GBMW's appeal based on its interpretation of  
22 NRS 233B.127(4) violates the requirements of the CWA;
  - 23 G. The SEC's interpretation of NRS 233B.127(4) is unconstitutional; and

- 1 H. NDEP's renewal of WPCP NEV0087001 violates state and federal law,  
2 because:
- 3 a. the mine is discharging pollutants into waters of the state from several  
4 point sources, yet NDEP has not issued a proper discharge permit for the  
5 mine as required by federal and state law;
  - 6 b. the mine is causing exceedances of water quality standards in the NFHR  
7 and its tributaries in violation of state and federal law;
  - 8 c. NDEP has not, as required by federal law, established total maximum  
9 daily loads (TMDLs) for the NFHR and its tributaries and cannot allow  
10 discharges into these waters until it does;
  - 11 d. the mine's discharges are causing elevated levels of selenium in LCT  
12 species in the NFHR and, therefore, constitutes an impermissible take  
13 under the federal Endangered Species Act;
  - 14 e. the mine's pit lakes are causing exceedances of drinking water standards  
15 in groundwater in violation of state law; and
  - 16 f. the groundwater diversion program is discharging water that violates  
17 arsenic standards into the shallow groundwater aquifer in the Sammy  
18 Creek drainage in violation of state law.
- 19 4. That this court grant Petitioner reasonable attorneys fees and costs; and  
20 5. That this court grant any further relief it deems just and proper.

1        Respectfully submitted this 5<sup>th</sup> day of September, 2006 by,

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1 **CERTIFICATE OF SERVICE**

2 I, Nicole Rinke, hereby certify that I served the foregoing upon the following  
3 individuals via the United States Postal Service, certified mail, this 5th day of September,  
4 2006:

5 John Walker  
6 Executive Secretary  
7 State Environmental Commission  
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9 Carson City, NV 89706-0851

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Nicole U. Rinke