

1 AARON D. FORD
Attorney General
2 DANIEL P. NUBEL (Bar No. 13553)
Deputy Attorney General
3 Office of the Attorney General
100 North Carson Street
4 Carson City, Nevada 89701-4717
T: (775) 684-1225
5 E: dnuvel@ag.nv.gov

6 *Attorneys for Nevada Division of
Environmental Protection*

7
8 **BEFORE THE STATE OF NEVADA
STATE ENVIRONMENTAL COMMISSION**

9
10 In the Matter of:

11 ABC RECYCLING LLC'S APPEAL OF
NDEP'S FEBRUARY 6, 2020 DECISION
12 TO REVOKE THE LATHROP MILL
RECLAMATION PERMIT #0171; AND
13 FORFEIT OF THE RECLAMATION
SURETY CASH DEPOSIT
14

**NEVADA DIVISION OF
ENVIRONMENTAL
PROTECTION'S REPLY IN
SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT**

15 The Nevada Division of Environmental Protection ("NDEP"), by and through legal
16 counsel, hereby files its Reply in Support of its Motion for Summary Judgment on
17 ABC Recycling LLC's ("ABC") Appeal. This Reply is based on the attached Memorandum
18 of Points and Authorities and all pleadings on file, the exhibits attached hereto, as well as
19 all oral arguments the State Environmental Commission ("SEC") will hear on this matter.

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION**

22 ABC's Opposition fails to address the points raised in NDEP's Motion for Summary
23 Judgment and instead makes arguments that are irrelevant to the question here—
24 whether NDEP's decision to revoke ABC's Permit for its admitted failure to pay its
25 statutorily required annual fee constitutes a "clear error of law." Ultimately, summary
26 judgment is appropriate here because there is no dispute regarding the decisive material
27 fact in this case. ABC did not pay its statutorily required annual fee despite NDEP's
28 repeated opportunities to regain compliance. In fact, the Opposition admits this critical

1 fact. *See* the Opposition at 3 (“it makes no sense for ABC to pay the fees while the State
2 continues to unreasonably without hold approval of the reclamation plan”).

3 ABC’s Opposition does not even dispute that NDEP has the authority to revoke a
4 permit for failure to pay an annual fee. *See* NRS 519A.150(9). Instead, ABC’s Opposition
5 seems to contend that the appeal is based on NDEP’s alleged “unreasonable withholding
6 approval” of ABC’s apparent reclamation plan. But, there are three major problems with
7 ABC’s argument here: (1) ABC has never submitted a revised reclamation plan for
8 NDEP’s review and approval; (2) even taking ABC’s false claim as true, ABC withholding
9 its statutorily required annual fee is not a remedy authorized by statute or regulation
10 and; (3) a ruling in ABC’s favor would be devastating to NDEP’s mission of protecting
11 public health and the environment because it would encourage permit holders to withhold
12 payment of annual fees whenever they disagree with NDEP’s decision.

13 Given that ABC admits it failed to pay its mandatory annual permit fee, and that
14 NDEP has the legal authority to revoke a permit based on nonpayment of this fee, the
15 SEC should enter summary judgment in NDEP’s favor here.

16 **II. RELEVANT FACTS**

17 Although the factual history of ABC’s Permit is stated within NDEP’s Motion to
18 Dismiss, there is an additional detail worth adding here in light of the arguments
19 asserted in ABC’s Opposition. ABC’s arguments now revolve around NDEP allegedly
20 withholding approval of an apparent reclamation plan. *See* Opposition at 2. However,
21 **ABC has never submitted a revised reclamation plan to NDEP for review and**
22 **approval.** *See* the Declaration of Todd Process, attached as Exhibit 1 at 1. NDEP has
23 requested a revised reclamation plan from ABC in the past, but ABC never submitted one
24 because it did not want to pay the required fee to revise the plan (\$4,166). *Id.* at 1–2.

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1 **III. LEGAL ANALYSIS**

2 **A. The SEC should grant summary judgment in NDEP’s favor because**
3 **ABC admits it did not pay its statutorily required annual fee, and**
4 **NDEP acted within its authority in revoking ABC’s permit based on**
5 **the nonpayment of this fee**

6 Summary judgment is appropriate when “no genuine issue of material fact exists,
7 and the moving party is entitled to judgment as a matter of law.” *Wood v. Safeway, Inc.*,
8 121 Nev. 724, 729 (2005). A factual dispute is genuine when the evidence is such that a
9 rational trier of fact could return a verdict for the nonmoving party. *Id.* While the
10 pleadings and proof must be construed in a light most favorable to the nonmoving party,
11 that party bears the burden to “do more than simply show there is some metaphysical
12 doubt” as to the operative facts in order to avoid summary judgment being entered in the
13 moving party’s favor. *Id.* at 732.

14 The Commission should grant summary judgment in favor of NDEP because ABC
15 cannot show that NDEP committed a clear error of law in revoking its permit given the
16 admitted fact that ABC did not pay its annual permit fee. NDEP has the legal authority
17 to revoke a permit for the failure of an operator to pay its required annual permit fee by
18 April 15. *See* NRS 519A.150(9) (granting NDEP authority to revoke for violation of a
19 statute or a regulation adopted by the Commission), NRS 519A.260 (requiring a mine
20 operator to pay an annual reclamation permit fee by April 15), NAC 519A.235 and
21 519A.240 (requiring a mine operator to pay an annual fee by April 15) and NAC 519A.390
22 (stating that a surety filed with NDEP is subject to forfeiture upon revocation of a
23 permit). ABC did not pay its annual permit fee on April 15, 2019, and ABC’s Opposition
24 admits this fact. NDEP gave ABC multiple deadlines after April 15, 2019, to pay the
25 annual fee, but ABC still refused to comply. Based on ABC’s failure to comply with
26 statute and regulation, NDEP justifiably utilized its power under NRS 519A.150(9) to
27 revoke ABC’s Permit.

28 ABC’s Opposition ignores ABC’s failure to pay its fee and NDEP’s statutorily
supported basis for revoking ABC’s permit. Instead, the Opposition argues that ABC’s

1 appeal has merit because of NDEP “unreasonably withholding approval” of an apparent
2 reclamation plan. As detailed above, ABC never submitted a revised reclamation plan to
3 NDEP. *See* Exhibit 1 at 1. But, even if you accept ABC’s false claim as true, it would not
4 serve as any basis to deny NDEP’s Motion. If ABC felt that NDEP had unreasonably
5 rejected a revised reclamation plan, its remedy would have been to appeal to the SEC
6 within 10 days of that decision. *See* NRS 445B.360. But no statute or regulation allows
7 ABC to instead refuse to pay its required permit fees because it feels it has been wronged.
8 Such a decision in ABC’s favor would encourage permittees to decline to pay required fees
9 when they disagree with a decision by NDEP, rather than going through the statutorily
10 established appeals process. This would be disastrous to NDEP’s mission, because 100%
11 NDEP’s Bureau of Mining Regulation and Reclamation’s costs and expenses are paid for
12 by industry fees such as the one here.

13 **B. ABC’s request for additional time under NRCP 56(d) is**
14 **inappropriate because it would not lead to the creation of a genuine**
15 **issue of material fact**

16 ABC’s Opposition requests that it be given more time to oppose summary judgment
17 under Nevada Rule of Civil Procedure 56(d). That rule states that a court may allow
18 additional time to obtain discovery when the nonmovant shows by affidavit or declaration
19 that it cannot present facts essential to justify its opposition. But, as stated in the case
20 law cited by ABC in its Opposition, “a motion for continuance under [NRCP 56(d)] is
21 appropriate only when the movant expresses how further discovery will lead to the
22 creation of a genuine issue of material fact.” *Aviation Ventures, Inc. v. Joan Morris, Inc.*,
23 121 Nev. 113, 117–118 (2005). ABC is not entitled to any additional time in this instance
24 because it cannot show that further time would lead to the creation of a genuine issue of
25 material fact. The only material fact in this case is ABC’s failure to pay its statutorily
26 required annual fee. ABC’s Opposition admits that it did not pay the fee. *See* the
27 Opposition at 3 (“it makes no sense for ABC to pay the fees while the State continues to
28 unreasonably without hold approval of the reclamation plan”). No amount of time will

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1 change this uncontested fact. For this reason, it would be inappropriate to grant ABC
2 additional time to respond under NRCP 56(d).

3 **IV. CONCLUSION**

4 For these reasons, the Commission should uphold NDEP's February 6, 2020,
5 decision to revoke the Lathrop Mill Reclamation Permit #0171 because ABC's Appeal fails
6 to set forth any facts or law showing that NDEP acted outside the scope of its jurisdiction
7 and authority. ABC violated NRS 519A.260 and NAC 519A.235 by failing to timely pay its
8 annual reclamation fee by April 15, 2019. Based on this fact alone, NDEP had authority
9 to revoke ABC's Permit and forfeit ABC's surety. NDEP took that action on February 6,
10 2020, and that decision took effect 10 days after it was made. ABC's Appeal makes no
11 claim that NDEP failed to follow the statutory due process requirements for revoking its
12 Permit. Based on these undisputed facts, it is clear ABC's failure to pay its annual permit
13 fee provided a sufficient basis to revoke ABC's Permit and forfeit its cash surety.
14 Therefore, NDEP committed no "error of law" in deciding to revoke ABC's Permit.

15 DATED this 15th day of May, 2020.

16 AARON D. FORD
17 Attorney General

18 By: /s/ Daniel P. Nubel
19 DANIEL P. NUBEL (Bar No. 13553)
20 Deputy Attorney General
21 100 North Carson Street
22 Carson City, Nevada 89701-4717
23 Tel: (775) 684-1225
24 Fax: (775) 684-1108
25 Email: DNubel@ag.nv.gov
26 *Attorneys for Nevada Division of*
27 *Environmental Protection*
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the State of Nevada, Office of the
3 Attorney General, and on this 15th day of May, 2020, I served a copy of the foregoing,
4 NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S REPLY IN SUPPORT OF
5 ITS MOTION TO DISMISS, via email to:

6 Val King
7 Executive Secretary
8 State of Nevada
9 State Environmental Commission
10 Email: vking@ndep.nv.gov

11 Byron Thomas, Esq.
12 3275 S Jones Blvd
13 Las Vegas, NV 89146
14 Email: byronthomaslaw@gmail.com
15 Attorney for ABC Recycling LLC

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/s/ Daniel Nubel
Daniel Nubel
State of Nevada,
Office of the Attorney General

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