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

8 **In the Matter of:**

9 **AVIS BUDGET CAR RENTAL, LLC'S**
10 **APPEAL OF LETTER REJECTING THE**
11 **ADDENDUM TO THE OFFSITE**
12 **CORRECTIVE ACTION PLAN FOR THE**
13 **COMMINGLED MTBE PLUME**

14 **AVIS BUDGET CAR RENTAL LLC'S**
15 **OPENING BRIEF**

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Avis Budget Car Rental, LLC ("ABCR") hereby files this Opening Brief in support of its Appeal of the Letter Rejecting the *Addendum to the Offsite Corrective Action Plan for the Commingled MTBE Plume* ("CAP Addendum") which constitutes a denial by the Nevada Division of Environmental Protection ("NDEP") of ABCR's request to conduct additional environmental remedial activities in a residential area with groundwater contaminated with methyl tertiary-butyl ether ("MTBE"). This Opening Brief is based upon the following Memorandum of Points and Authorities, all pleadings, papers and exhibits filed in this matter and the evidence and argument to be presented at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Between 1994 and 2007, five releases of gasoline associated with the former Avis Car Rental Facility ("Avis Facility") at McCarran Airport in Las Vegas, Nevada were discovered. ABCR (and its corporate predecessors) immediately began working with NDEP and other parties responsible for gasoline contamination associated with airport car rental facilities to investigate and remediate the contamination resulting from these releases.

1 On September 27, 2018, a CAP Addendum (Exhibit A) was filed with NDEP on behalf of
2 ABCR seeking the consent of NDEP to remediate MTBE-contaminated groundwater that has
3 migrated into a residential area from the former McCarran Airport car rental facilities. ABCR
4 proposed remediation because MTBE in off-site groundwater remains above the 200 µg/l state
5 action level established by NDEP for the site, and because remediation has never been attempted
6 in the off-site area. The residential area at issue is 2,400 to 3,300 feet downgradient from the
7 Avis/National/Payless source areas and evidenced MTBE concentrations in the groundwater of
8 1,400 µg/l and 2,000 µg/l as of December 2017, which was the most recent sampling data available
9 at the time of the submittal of the CAP Addendum.
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11 In a letter to ABCR dated October 15, 2018 (Exhibit B), NDEP denied ABCR's request to
12 amend its CAP and stated that "previous corrective actions have successfully reduced
13 concentrations of MTBE and other petroleum hydrocarbons significantly and that remaining
14 concentrations of MTBE are sufficiently decreasing due to natural attenuation (biodegradation)".
15 On this basis, NDEP concluded that "no remediation of the down-gradient area is necessary at this
16 time". *Id.*
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18 NDEP's denial of ABCR's request to amend its CAP, which effectively is a denial of
19 ABCR's access to Nevada Petroleum Trust Fund monies for the remedial activities proposed in
20 the CAP Addendum, is clearly erroneous in view of the reliable, probative and substantial evidence
21 on the whole record (NAC 445B.890.2(e)) and is arbitrary and capricious and characterized by an
22 abuse of discretion (NAC 445B.890.2 (f)) and must, for those reasons, be reversed.
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24 **II. RELEVANT SITE HISTORY**

25 **A. Discovery of Releases and Initial Assessments**

26 Following is the relevant site history for the Avis Facility for the purposes of this appeal.¹
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28 ¹ Except as otherwise noted, the information in Section II is the *Addendum to the Corrective*

1 1. 1994 Releases (2 releases)

2 A gasoline release was first discovered at the former Avis Facility in 1994 during a soil
3 investigation performed in response to a leaking underground storage tank ("UST"). Subsurface
4 investigation activities conducted in response to the UST release discovered that underground
5 piping associated with five gasoline USTs on the former Avis Facility was leaking gasoline. In
6 response, the failed piping was replaced and approximately 644 tons of gasoline-impacted soil was
7 excavated from beneath the piping. Soil was excavated down to the uppermost caliche layer in the
8 area, after which soil borings were drilled, with completion as groundwater monitoring wells.
9 Groundwater samples collected from groundwater wells installed in the vicinity of the USTs
10 indicated concentrations of dissolved benzene above the Nevada state action level of 5 µg/L. In
11 1997, remediation activities (described under II.C., below) were started on the Avis leasehold.
12 Also in 1997, NDEP added MTBE to the groundwater sampling requirements. MTBE was
13 subsequently identified above the site-specific action level of 200 µg/L.
14

15 2. 2001 Release (1 release)

16 On November 8, 2001, the UST on the former Avis Facility designated UST #3 failed a
17 Veeder-Root tightness test. On November 13, 2001, 2.5 feet of gasoline were discovered in a
18 monitoring well adjacent to UST #3. UST #3 was drained and removed from service after the
19 discovery of the release and recovery of free product (gasoline) from adjacent groundwater
20 monitoring wells began immediately and continued through June 2009.
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22 3. 2007 Releases (2 releases)

23 Between May 21 and 24, 2007, the five gasoline USTs and the associated dispensers were
24 removed from the Avis Facility. During removal, the turbines associated with UST #2 and UST
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Action Plan for the Former Avis On-Site Facility, McCarran International Airport, Las Vegas, Nevada, Broadbent & Associates, Inc., May 22, 2012. (Exhibit C.)

1 #5 were discovered to be leaking. Impacted soils were identified beneath the USTs and,
2 consequently, approximately 11,300 tons of petroleum hydrocarbon impacted soils were excavated
3 from the vicinity of the UST system at the property.

4 **B. Investigation Activities and Site Characterization**

5 Approximately 350 soil borings, with approximately 175 completed as groundwater
6 monitoring wells, have been installed by the McCarran Airport car rental facilities (i.e., Avis,
7 Payless/Allstate, and National) to investigate and monitor impacts to groundwater. (Exhibit D.)
8 From 1994 to 2008, petroleum release characterization activities, conducted with NDEP oversight,
9 focused on shallow zone soil and groundwater (i.e., to a depth of approximately 30 feet below
10 ground surface (bgs)). Characterization of the release impacts was conducted concurrent with
11 remediation. In 2008, additional characterization of deeper zone soil and groundwater, conducted
12 to improve remedial progress, identified petroleum hydrocarbon impacts and differing lithology
13 from approximately 30 to 80 feet bgs. Deeper zone soil and groundwater characterization began
14 in 2008 and continued through 2016. (Exhibit E.)

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17 Through 2006, the dissolved MTBE plume in shallow zone groundwater contiguously
18 extended nearly 5,000 feet downgradient of the McCarran car rental facilities. By 2008, the
19 dissolved MTBE plume in shallow zone groundwater had decreased in size and split into smaller
20 plumes. Each of the three McCarran car rental facilities appeared associated with a smaller,
21 shallow plume. The larger offsite plume, located in the downgradient residential area, was
22 considered to be a commingled plume. Post-2008, the majority of the dissolved MTBE was
23 identified in deeper zone groundwater and by 2016, no concentrations of MTBE were identified
24 above the site-specific MTBE action level of 200 µg/L in shallow zone groundwater. (Exhibit F.)

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26 As of the Fourth Quarter 2017, the highest dissolved MTBE concentrations were found in
27 the downgradient residential area (1,400g/L in OMW-43-60, OMW-73-57, and OMW-74-61) and
28

1 in one well associated with a McCarran car rental facility located upgradient of the Avis Facility
2 (2,000 µg/L in MW-16-60). (Exhibit D.)

3 **C. Remediation Activities**

4 In March 1997, an air sparge/vapor extraction ("AS/VE") remediation system, consisting
5 of 13 AS wells and 12 VE wells, was put into operation on the former Avis Facility. The AS/VE
6 remediation system was designed to target and remediate shallow zone (i.e., <30 feet) petroleum
7 hydrocarbon impacted soil and groundwater. The AS/VE remediation system operated until June
8 2007. Use of the AS/VE remediation system was discontinued due to decreasing dissolved
9 petroleum hydrocarbon concentrations in the shallow zone and due to the demolition of the
10 McCarran car rental facilities.
11

12 In October 1997, the injection of a hydrogen peroxide solution into selected wells on the
13 former Avis Facility was instituted as an additional remedial technique. The hydrogen peroxide
14 injections were designed to target and remediate shallow zone petroleum hydrocarbon impacted
15 groundwater. Hydrogen peroxide injection continued at the former Avis Facility until August
16 2005. Hydrogen peroxide injections were discontinued due to declining shallow zone
17 concentrations and limited returns based on the cost of continued injections.
18

19 In May 2002, two AS and two VE remediation systems, consisting of a total of 27 AS wells
20 and 28 VE wells, were put into operation on the former Howard Johnsons facility located
21 downgradient of the McCarran car rental facilities. Remedial activities for the Howard Johnson's
22 properties are described in the October 5, 2000, *Off-Site Corrective Action Plan, Avis/Payless Co-
23 Mingled Petroleum Hydrocarbon Plume, Las Vegas*. (Exhibit G.) The Howard Johnson's property
24 was one of the downgradient properties where groundwater was contaminated with benzene and
25 MTBE from the fuel releases at the Avis facility. (Exhibit D.) The Howard Johnson's AS/VE
26 remediation system was designed to target and remediate shallow zone petroleum hydrocarbon
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1 impacted soil and groundwater. The AS/VE remediation system operated until August 2013. Use
2 of the Howard Johnson's AS/VE remediation system was discontinued due to decreasing dissolved
3 petroleum hydrocarbon concentrations in the shallow zone beneath the Howard Johnson's facility.

4 Additional soil remediation occurred at the former Avis facility in June 2007, post UST-
5 removal. Approximately 11,300 tons of petroleum hydrocarbon impacted soils were removed
6 from beneath the former location of the USTs. Excavation extended vertically to approximately
7 32 feet bgs. The excavation was subsequently backfilled with clean fill.

9 Based on a successful pilot test of PulseOx™ remediation technology from February to
10 October 2011, a full scale PulseOx™ remediation system was installed and operated on the former
11 Avis facility from October 2012 to December 2014. The PulseOx™ remediation system was
12 designed to target and remediate deeper zone (i.e., >30 feet) petroleum hydrocarbon impacted
13 groundwater beneath the former Avis Facility. Use of the PulseOx™ remediation system was
14 discontinued once dissolved petroleum hydrocarbon concentrations reduced to below the State
15 action level. (Exhibit F.)

17 As required by NDEP, the October 5, 2000, *Off-Site Corrective Action Plan, Avis/Payless*
18 *Co-Mingled Petroleum Hydrocarbon Plume, Las Vegas, Nevada* (Exhibit G) includes a
19 commitment to conduct active remediation in the off-site area, east of Swenson Street. To date,
20 active remediation has not been performed in the off-site area, east of Swenson Street.

22 LEGAL AUTHORITY

23 ABCR brings this appeal pursuant to NAC 445B.890.2 (e) and (f) and asserts that this final
24 decision by NDEP: (1) was clearly erroneous in view of the reliable, probative and substantial
25 evidence on the whole record (NAC 445B.890.2 (e)); and (2) was arbitrary or capricious or
26 characterized by an abuse of discretion (NAC 445B.890.2 (f)).

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DISCUSSION

A. NDEP Was Arbitrary And Capricious And Abused Its Discretion By Denying ABCR's Request To Access Petroleum Fund Monies In ABCR's Account To Remediate MTBE Above Site-Specific Action Levels

As of the Second Quarter 2018, groundwater beneath an approximately 3.5-acre area located east of McCarran International Airport, between Swenson Street and Maryland Parkway in Las Vegas, Nevada, was shown to be contaminated by MTBE. The properties overlying the contaminated groundwater are generally developed for residential use, including single family homes and apartment complexes. (Exhibit H.) The Second Quarter 2018 monitoring data for this residential area showed MTBE concentrations up to 1,700 µg/L. While a network of 35 groundwater wells is routinely monitored in the vicinity of the 3.5-acre MTBE groundwater plume, to date, active remediation in this 3.5-acre portion of the MTBE plume has not been attempted.

NDEP has assigned a site-specific action level of 200 µg/L MTBE in groundwater and routinely refers to ABCR's assigned site-specific action level in NDEP correspondence. Most recently, the NDEP compared MTBE concentrations in groundwater related to the Avis facility site-specific action level in its March 31, 2017 letter to ABCR. In addition to assigning 200 ug/L MTBE as the site-specific action level, NDEP uses 200 ug/L in groundwater as a state-wide general action level for MTBE. NDEP established the state-wide MTBE action level in the *MTBE Oxygenated Fuel Corrective Action Guidance* dated October 1998 (the "Guidance") (Exhibit I) at 200 ug/L for sites with incomplete exposure pathways. The Guidance further states that "corrective action measures should be implemented on MTBE-impacted groundwater as soon as possible after release confirmation."

ABCR's CAP Addendum proposes enhanced biodegradation to reduce MTBE concentrations in groundwater. Proposed cleanup activities include the installation of 15 remediation wells and oxygenation of groundwater and addition of nutrients. The CAP Addendum

1 proposes to evaluate groundwater conditions monthly, and collect groundwater samples quarterly,
2 to evaluate the effectiveness of the cleanup activities, and allow for adjustments in the application
3 volume of dissolved oxygen and nutrient levels. The forecast cost of the remediation and
4 monitoring activities is approximately \$150,000. The CAP Addendum anticipates one year of
5 active remediation, followed by verification monitoring.
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7 ABCR currently has active Fund allocation for the two 2007 releases (\$1,8000,000, after
8 10% copay) which was authorized in a letter dated February 6, 2008, and currently has a remaining
9 available balance of \$134,879. (Exhibit J.) ABCR has not accessed the third-party liability funds
10 for the two 2007 releases, which grants another \$1,800,000 for ABCR's use. Combining these
11 two allocations, ABCR has a remaining available balance of \$1,934,879 for investigative and
12 remedial activities.
13

14 The arbitrary and capricious nature of NDEP's decision is further evidenced by its approval
15 in 2017 of a CAP for the National Car Rental Facility, another of the McCarran Airport facilities
16 involved in the MTBE cleanup. (Exhibit K.) Specifically, on May 18, 2017, NDEP approved a
17 CAP for remedial activities at the former National Car Rental Facility for MTBE ranging from 3.2
18 to 2,400 ug/L, a range roughly comparable to the levels of MTBE present in the residential area
19 that ABCR seeks to remediate. This CAP was proposed by the Clark County Department of
20 Aviation, the responsible party for the National Car Rental Facility, and was designed to address
21 on-site contamination owned by Clark County. Accordingly, not only are the MTBE levels
22 substantially the same or lower than the levels ABCR wishes to address, there is arguably less need
23 for remediation for property owned by a responsible party where deed restrictions or
24 environmental covenants could be put in place to address contamination remaining on-site. In its
25 CAP Addendum, ABCR does not own the residential property it seeks to remediate and therefore
26 does not have the opportunity to employ such covenants or restrictions, making its request even
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1 more justifiable than that for the National Car Rental Facility. NDEP's decision to grant the CAP
2 for the National Car Rental Facility and deny ABCR's CAP Addendum is prima facie arbitrary
3 and capricious.

4 In sum, ABCR's CAP Addendum seeks to use a relatively modest \$150,000 of the nearly
5 two million dollars remaining in its Petroleum Fund account to undertake remedial activities in a
6 residential neighborhood with demonstrated levels exceeding the site-specific action levels, as well
7 as NDEP guidance, where no remedial activities have been undertaken previously. NDEP's
8 actions in denying ABCR's request to modify the CAP to allow for these remedial activities is
9 arbitrary and capricious and is an abuse of discretion warranting reversal of that decision.
10

11 **B. NDEP's Denial Of The CAP Addendum Was Clearly Erroneous In View Of The**
12 **Reliable, Probative And Substantial Evidence On The Whole Record**

13 The MTBE plume in groundwater appears stable. If active remediation is not performed
14 and the MTBE concentrations are left unabated, MTBE concentrations higher than the MTBE
15 action of 200 ug/L are expected to persist for 10 to 20 years into the future. (Exhibit L.) A study
16 conducted to evaluate biodegradation concludes that the future rate of biodegradation is uncertain,
17 that significant aerobic biodegradation is not likely occurring, and the rates of biodegradation
18 could be increased by increasing dissolved oxygen and nutrients within the offsite MTBE plume.
19 (Exhibit L.)
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21 ABCR's CAP Addendum proposes enhanced biodegradation to reduce MTBE
22 concentrations in groundwater. Proposed cleanup activities include the installation of 15
23 remediation wells and oxygenation of groundwater and addition of nutrients. The CAP Addendum
24 proposes to evaluate groundwater conditions monthly, and collect groundwater samples quarterly,
25 to evaluate the effectiveness of the cleanup activities, and allow for adjustments in the application
26 volume of dissolved oxygen and nutrient levels. The CAP Addendum anticipates one year of active
27 remediation, followed by verification monitoring with a forecasted cost of approximately
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1 \$150,000.

2 The cost of groundwater monitoring is approximately \$50,000 per year. (Exhibit M.) The
3 cost to monitor groundwater for the projected 10 to 20 years until sufficient natural attenuation has
4 occurred for the NDEP to close the case will exceed the estimated cost for remediation more than
5 5-fold. ABCR's CAP Addendum proposes a more cost-effective alternative for remediation of the
6 offsite than monitored natural attenuation.
7

8 Because ABCR's CAP Addendum proposal is more cost-effective and presents a nearer
9 term opportunity for ABCR to achieve clean closure, NDEP's denial of the CAP Addendum was
10 clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

11 **C. NDEP'S Attempt to Force an Exemption-Based Closure is Contrary to Law**

12 In its October 15, 2018 rejection letter, the NDEP states: "the Site is a good candidate for
13 evaluating a groundwater exemption closure", further, identified a "No further action request and
14 presentation for the Site" to be among the documents that "NDEP expects . . . to be submitted by
15 **June 30, 2019**" (emphasis original). ABCR has not requested a groundwater exemption closure
16 and does not intend to request such a closure at this time. ABCR has repeatedly expressed its
17 desire to seek a "clean", not exemption-based, closure to NDEP. Despite ABCR's repeated
18 assertions to the contrary, NDEP continues to pursue an exemption-based closure.
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20 NDEP's attempts to direct the closure pathway utilized by ABCR, and the and closure type
21 to be received by ABCR in the future, are contrary to the clear language of Nevada law, which
22 gives the responsible party the option of selecting a clean or exemption-based closure. *See e.g.*
23 NAC 445.22725 which states in paragraph 2 that "*An owner or operator may, before initiating*
24 *corrective action or after the termination of remediation pursuant to NAC 445A.22745, submit a*
25 *written request to the Director for an exemption from the provisions of subsection 1*", and NAC
26 445A.22745 which states in paragraph 1 "After any corrective action required by NAC
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1 445A.22725 involving the treatment of groundwater is begun, the *owner or operator may*
2 *terminate remediation of the release after submitting written documentation* and receiving written
3 concurrence from the Division . . .” (emphasis added).

4 The importance of ABCR to seek clean closure is exacerbated by the exhaustion of Payless'
5 Petroleum Fund monies and the lack of participation in investigation and remedial activities by the
6 owners and operators of the Payless Facility following the exhaustion of the Fund. Specifically,
7 sometime in 2017, the Fund account associated with the Payless release was fully depleted, at
8 which time representatives of Payless stopped work on the project, and correspondence between
9 Willden Automotive Holdings, LLC and the State of Nevada indicated a denial of personal liability
10 by Nicholas and David Willden. (Exhibit N.) The absence of a willing jointly responsible party
11 with sufficient funds to either contest or resolve potential third-party claims, redoubles the need,
12 and the desire, of ABCR to achieve a case closure based on cleanup of the site to the site-specific
13 clean up levels rather than an exemption based closure which would result in contamination levels
14 above the action level remaining in the groundwater.

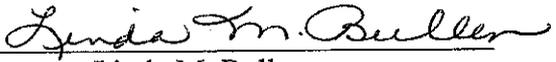
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17 The closure regulations are clear that the decision whether to pursue an exemption-based
18 closure is that of the responsible party, not NDEP, and any attempt by NDEP to direct a responsible
19 party toward one type of closure over the other by any means, including denial of a request to
20 conduct remedial activities covered by the Petroleum Trust Fund, is contrary to Nevada law.

21 CONCLUSION

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23 In its CAP Addendum, ABCR proposed active remediation of groundwater in the offsite
24 plume to reduce MTBE concentrations in a residential area downgradient from the former ABCR
25 facility. Enhanced biodegradation is a cost-effective alternative to reduce MTBE concentrations
26 in groundwater. Denial of ABCR's request for approval of the CAP Addendum and the
27 corresponding access to project funding from the Petroleum Fund is an abuse of agency discretion
28 and was clearly erroneous in view of the reliable, probative and substantial evidence on the whole

1 record. Accordingly, ABCR requests that NDEP's rejection of the CAP Addendum be vacated
2 and that NDEP be directed to approve the requested remedial work under ABCR's CAP
3 Addendum.

4 Respectfully submitted on January 24, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Bullen Law, LLC and that on the 24th day of January, 2019, I electronically mailed a true and correct copy of the foregoing document to the following:

Val King
vking@ndep.nv.gov
Executive Secretary
State of Nevada
State Environmental Commission

Dan Nubel, Esq.
dnubel@ag.nv.gov
Attorney for Appellee
Nevada Division of
Environmental Protection


An Employee of Bullen Law, LLC

EXHIBIT LIST

- Exhibit A Addendum to Offsite Corrective Action Plan for the Commingled MTBE Plume
- Exhibit B NDEP Letter Rejecting Addendum to Offsite Corrective Action Plan
- Exhibit C Addendum to the Corrective Action Plan for the Former Avis On-Site Facility, May 2012
- Exhibit D McCarran Data Package 2017
- Exhibit E Draft Hydrogeologic Conceptual Site Model Report, August 28, 2018
- Exhibit F Groundwater Monitoring and Remediation System Operations and Maintenance Report, 4Q 2007
- Exhibit G Offsite Corrective Action Plan Avis-Payless Co-Mingled Petroleum Hydrocarbon Plume 2000
- Exhibit H MTBE Distribution Maps
- Exhibit I NDEP 1998 Oxygenated Fuel Corrective Action Guidance
- Exhibit J Petroleum Fund Reimbursement Recommendation
- Exhibit K NDEP Letter to DOA
- Exhibit L Draft Fate and Transport Report and BIOSCREEN Model
- Exhibit M Jason Hoffman Statement
- Exhibit N Willden Automotive Holdings Letter