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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 **REPLY BRIEF**

16 Avis Budget Car Rental, LLC ("ABCR") hereby files this Reply Brief to NDEP's Response
17 Brief filed on February 14, 2019 in this matter. Contrary to the Nevada Division of Environmental
18 Protection's ("NDEP") assertion that this appeal is an effort by ABCR to compel an expenditure
19 of public funds "in an attempt to reduce perceived corporate liability" (NDEP's Response Brief at
20 1), it is, rather, an effort by a responsible corporate citizen to compel remedial activities to address
21 groundwater contamination that exceeds the cleanup level established by the NDEP for a
22 residential neighborhood that has neither been the object of previous remedial action nor has been
23 formally notified by NDEP of the presence of this contamination. Specifically, ABCR is seeking
24 to conduct corrective actions to address methyl tert-butyl ether ("MTBE") contamination from
25 gasoline releases associated with its past rental car fueling operations at McCarran International
26 Airport from groundwater beneath residential properties located east of the airport. ABCR's
27 objectives are to reduce potential future exposure risks to the residents of the affected
28 neighborhood, and to reduce potential risks to underlying and downgradient groundwater
resources by requesting that a modest amount of the Petroleum Fund monies left in ABCR's
account be used to actively remediate the groundwater in the heretofore passively addressed area
of contamination in what ABCR believes will cost-effectively and expeditiously reduce MTBE
levels to below the cleanup level established for this site by NDEP.

1 DISCUSSION

2 **1. ABCR's Actions Are Simply an Attempt to Compel NDEP to Enforce Its Own**
3 **Determinations**

4 As NDEP concedes, the site-specific clean up level for MTBE at the ABCR and Payless
5 sites is 200 µg/L. (NDEP's Response Brief ("Response Brief") at p. 9, line 21.) Indisputably, the
6 most recent MTBE levels in the residential neighborhood where ABCR seeks to remediate far
7 exceeds this level. *See e.g., id.*, p. 3, lines 21-23, Exhibit P, para. 57 and Exhibit R. If, as NDEP
8 now asserts, the remaining levels do not create a potential future risk to human health and the
9 environment¹, then ABCR questions why the levels were ever established at 200 µg/L to begin
10 with. If NDEP sincerely believes that levels higher than 200µg/L do not and will not ever pose a
11 threat to human health or the environment, then why as recently as January 25, 2019 has NDEP
12 maintained in a letter to Payless Car Rental (aka Allstate Car Rental) ("Payless/Allstate"), the party
13 with whom NDEP asserts shares responsibility with ABCR for the commingled plume, that
14 Payless/Allstate is responsible to remediate the contamination to 200 µg/L? (Exhibit P). *See*
15 Exhibit P, para. 57. ("As of the third quarter 2018 sampling event, concentrations of MTBE in
16 groundwater near the Allstate source area are as high as 1,000 micrograms per liter (µg/L),
17 *exceeding the Site Specific Action Level of 200 µg/L.*" (Emphasis added.) It seems disingenuous
18 at best to assert that levels acknowledged to be as high as 1700 µg/L, as they have been reported
19 in the CAP Addendum area do not have the potential to pose a risk to human health or the
20 environment while at the same time requiring a co-contributor to the contamination to clean up to
21 200µg/L².

22 _____
23 ¹ In asserting that the off-site contamination does not present a risk to human health or the
24 environment, NDEP cites to the December 2000 Screening Risk Assessment. *See* Response Brief,
25 p. 7, lines 11-12. A more appropriate and updated evaluation of risk is contained in the 2009
26 "Human Health Risk Assessment Update, Avis/National/Payless Commingled Groundwater
27 Plume, Las Vegas, Nevada", issued by Broadbent & Associates, Inc. on December 30, 2009,
28 Exhibit O hereto.

26 ² Also, interestingly, the Payless letter described the observed levels in the commingled
27 MTBE plume to be "*as high as 1,700 µg/L*". (Exhibit P, para. 57, emphasis added.) Thus, it
28 appears that 1,700 µg/L is a high level when NDEP wants to point to it as a basis to compel action,
but not high enough when ABCR's cites the identical level as the basis for requesting to conduct
remedial activities.

1 If, as NDEP now asserts in response to ABCR's CAP Addendum, levels exceeding 200
2 µg/L are not a threat to human health and the environment, then the appropriate action by the
3 agency would be to modify the site-specific clean up level to those higher levels. Until such time
4 as NDEP takes such action, ABCR is, by its CAP Addendum, attempting to conduct cleanup
5 actions needed to comply with NDEP's own determinations with regard to what the acceptable
6 level of MTBE remaining in the groundwater should be. In sum, if the MTBE clean up level for
7 this site is unnecessarily low, NDEP should raise it. Until such time as it does, the agency is
8 arbitrary and capricious in denying ABCR's request to conduct remedial activities intended to
9 reduce MTBE concentrations in groundwater beneath the offsite residential neighborhood to below
10 the site-specific state action level of 200 µg/L.

11 **2. Whether to Seek an Exemption-Based Closure is ABCR's Decision, Not NDEP's**

12 NDEP relies on the concept that an agency should be given "great deference" in
13 interpreting a statute that the agency is charged with enforcing. (NDEP at 14, citation omitted.)
14 The concept of deference to agency interpretation, upon which NDEP heavily relies, is itself
15 currently under attack in the case of *Kisor v. Wilke*, 869 F.3d 1360 (2017), which will be argued
16 before the U.S. Supreme Court on March 27, 2019. Depending on the outcome of *Kisor*, the
17 deference to agencies could be eroded if not completely eradicated in the future. But the future of
18 the concept of agency deference aside, it does not now, nor has it ever, meant unbridled obeisance
19 to agency decisions, particularly when those decisions are clearly contrary to applicable law.

20 The applicable regulation on this issue is NAC 445.22725 which states in paragraph 2 that
21 "*An owner or operator may, before initiating corrective action or after the termination of*
22 *remediation pursuant to NAC 445A.22745, submit a written request to the Director for an*
23 *exemption from the provisions of subsection 1*" (emphasis added). There is no reasonable
24 construction of that regulation that can lead to any conclusion other than that it is the owner or
25 operator's decision whether to request an exemption-based closure. ABCR does not dispute
26 NDEP's authority to compel the work necessary to investigate and remediate a site for which an
27 owner or operator has legal responsibility, but the ability of an agency to compel remedial activities
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1 is vastly different than the authority to determine what type of closure a responsible party may
2 seek. ABCR concurs wholeheartedly with NDEP's assertion that "[w]hen read in context, it is
3 clear that NAC 445A.227425(2) *was intended to provide a responsible party the opportunity to*
4 *request exemption* when NDEP ordered corrective action" (emphasis added). (Response Brief,
5 p.16). The regulation is clear: exemption-based closures may be requested *by the responsible*
6 *party*, not the agency. NDEP's attempt to force an exemption-based closure on ABCR is clearly
7 contrary to governing law.³

9 **3. NDEP's Decision is a Final Agency Action Denying ABCR Access to Funds Allocated**
10 **to for this Remedial Action Which Gives ABCR Standing to Appeal**

11 As stated by ABCR in its Opening Brief (ABCR Opening Brief, p. 8, lines 9-12), ABCR
12 has \$134,879 remaining in Fund allocations for two 2007 releases and it has not accessed the third-
13 party liability funds for these two releases. Accordingly, there is another \$1,800,000, on top of
14 the \$134,879, available to ABCR to address Third Party Liability Claims, which are defined as
15 "damages to a person other than this state or the operator of the tank". See State Board of Review
16 Claims, Resolution No. 2007-10, Exhibit Q, para. 1. This Resolution further states that "any
17 corrective action measures that are performed off-site may be considered as a third party liability
18 action". *Id.* at para. 7.

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20 Accordingly, ABCR's request to remediate off-site contamination falls under the definition
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24 ³ In addition to being contrary to Nevada law, NDEP's attempt to force an exemption-based
25 closure at this time violates Federal case closure regulations, specifically, 40 CFR §280.67 which
26 requires at paragraph (d) that "The implementing agency must give public notice that complies
27 with paragraph (a) of this section if implementation of an approved corrective action plan does not
28 achieve the established cleanup levels in the plan and termination of that plan is under
consideration by the implementing agency". The public has never been given notice of the ABCR
releases, and closure, absent the notice required by §280.67, is therefore contrary to Federal
regulation.

1 of third party liability action, entitling it to access the as yet untouched \$1,800,000 allocated to it
2 for remediation of the 2007 releases. The denial of ABCR's request indisputably makes it a party
3 aggrieved by that denial and gives it standing to appeal NDEP's decision.

4 **4. The Petroleum Fund Specifically Addresses Third Party Liability**

5 Throughout its Response Brief, NDEP finds fault with ABCR for the company's concerns
6 about third party liability (*see e.g.* Response Brief at p. 20, lines 12-18 "NDEP does not have the
7 responsibility to approve Petroleum Funds to reduce perceived corporate liability . . ."). Frankly,
8 ABCR's reason for seeking to conduct off-site remedial activities is irrelevant to the analysis of
9 whether NDEP's denial of ABCR's request was an abuse of discretion, but this criticism is
10 particularly misplaced when the Petroleum Fund itself is designed to address third party claims.
11 *See* NRS 590.890 (3)(a). Clearly, the Nevada Legislature was addressing the very issue of
12 corporate liability when it incorporated third party liability coverage into the Fund. Moreover, as
13 set forth in Section 3 above, State Board to Review Claims Resolution No. 2007-10 makes it clear
14 that third party Fund monies can be used for off-site remedial work, not just to pay for or defend
15 against claims made by third parties. The remedial work contemplated in ABCR's CAP
16 Addendum is precisely what the third party claims portion of the Petroleum Fund was designed to
17 pay for, and it was an abuse of discretion and contrary to Nevada law for NDEP to deny ABCR's
18 request to utilize the funds in ABCR's Fund account to conduct the remedial work that ABCR
19 seeks to conduct.

20 **5. The Ability to Appeal an NDEP Decision is Important to Maintain The System of** 21 **Regulatory Checks and Balances**

22 NDEP is concerned that "[i]f the SEC were to override NDEP's decision not to approve
23 the CAP Addendum, it would undermine NDEP's authority". *See* Response Brief at p. 20, lines
24 26-27. Carried to its logical conclusion, this statement suggests that regulatory bodies should be
25 unfettered in their decision-making, without fear of having their erroneous decisions overturned
26 by an appellate body. Overturning or modifying an unlawful decision is not a usurpation of an
27 agency, but rather, is an important part of this country's long established system of regulatory
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1 checks and balances. Without it, regulatory agencies would be unfettered in their decision-making.
2 Rather than view an appeal as a threat to its authority, NDEP should view the appeal process as an
3 important component in a system designed to ensure that as an agency, it makes lawful and the
4 most sound decisions possible in every instance.

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6 Similarly, NDEP argues that a ruling of the SEC “in favor of ABCR, it would set precedent
7 that any reasonable party could appeal to the SEC any time they disagreed with NDEP’s decisions
8 regarding management of corrective action cases”. Response Brief, p. 21 at 1-2. The reality is
9 that, under the Administrative Procedure Act, any person adversely affected or aggrieved by a final
10 agency decision has the right to appeal that action. A SEC ruling in favor of ABCR in the appeal
11 will not impact the appellate paradigm in any fashion.

12
13 Finally, ABCR does not see the Petroleum Fund as “a bank account to spend however they
14 see fit”. Response Brief, p. 21, lines 10-11. ABCR has worked diligently with NDEP and the
15 other responsible parties for nearly two decades in response to the release of petroleum from the
16 former airport car rental facilities. ABCR has taken the lead in bringing the other responsible
17 parties to the table and encouraged them to cooperate with NDEP to address the MTBE
18 contamination that resulted from automotive fuel storage and handling operations at the former
19 airport car rental facilities. At this juncture, ABCR simply wants to see the cleanup through to the
20 end and address the contamination remaining in the groundwater in a residential neighborhood
21 that has, to date, never been remediated as a part of this action. ABCR does not think that the 23
22 years (Response Brief, p. 4 at lines 9-10) that NDEP projects that it will take for natural attenuation
23 to bring the MTBE levels down to below the cleanup level established by NDEP is appropriate,
24 prudent or legally necessary when Petroleum Fund monies are available to implement the remedial
25 action plan that is designed, for a very modest amount of money, to accelerate bringing MTBE
26 levels down to below the state action level.
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CONCLUSION

On the basis of the foregoing, ABCR respectfully requests that NDEP's rejection of its CAP Addendum be vacated and that NDEP be directed to approve the requested remedial work identified in the CAP Addendum.

Respectfully submitted on February 28, 2019.

Avis Budget Car Rental, LLC

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Bullen Law, LLC and that on the 28th day of February, 2019, a true and correct copy of the foregoing document was emailed to the following:

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