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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**  
11 ***THE ADDENDUM TO THE OFF-SITE***  
***CORRECTIVE ACTION PLAN FOR***  
***THE COMMINGLED MTBE PLUME***

**NDEP'S RESPONSE BRIEF**

12  
13 The Nevada Division of Environmental Protection ("NDEP"), by and through legal  
14 counsel, hereby files its Response to Avis Budget Car Rental LLC's ("ABCR") Opening  
15 Brief and Memorandum of Points and Authorities in Support Thereof. This Response is  
16 based on the attached memorandum of points and authorities and all pleadings on file,  
17 the exhibits attached hereto, as well as all oral arguments the State Environmental  
18 Commission will hear on this matter.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. INTRODUCTION**

21 In the present case, ABCR is attempting to usurp NDEP's regulatory authority by  
22 ordering itself to take corrective action to remediate a plume that presents no risk to  
23 human health or the environment now, and into the future. ABCR's reason for requesting  
24 the Corrective Action Plan Addendum ("CAP Addendum") is not complex – it wants to  
25 expend public funds in an attempt to reduce perceived corporate liability. NDEP  
26 estimates that the CAP Addendum would cost the Petroleum Fund significantly more  
27 than ABCR's \$150,000 estimate with no assurance that it would accelerate degradation of  
28 the constituent of concern. NDEP has directed ABCR to request a groundwater exemption

1 closure - a more cost effective process that calls for ABCR to completely assess and  
2 characterize the contamination plume and allow it to naturally attenuate over time.  
3 Simply put, ABCR's CAP Addendum would be prohibitively costly and is unnecessary to  
4 protect public health and the environment. The SEC cannot allow ABCR to expend public  
5 funds on a site that no longer endangers human health and the environment. For these  
6 reasons and those stated more fully below, NDEP's decision to deny the CAP Addendum  
7 was reasonable and prudent under the circumstances.

## 8 **II. STATEMENT OF FACTS**

### 9 A. Release History

10 Between 1994 and 2007, several gasoline releases from underground storage tanks  
11 ("USTs") were discovered at or around the Avis Car Rental Facility ("Avis Facility"). Avis  
12 admits liability for these releases, and NDEP does not dispute the release history detailed  
13 in ABCR's Opening Brief.

14 Since shortly after the discovery of the first release, NDEP has been actively  
15 regulating the cleanup of the Avis site. At present, the primary contaminant of concern in  
16 the groundwater is methyl tertiary-butyl ether (MTBE).

### 18 B. The Plume

#### 19 1. *Off-site Plume History*

20 Releases of gasoline from USTs and dispenser piping located at the former Avis  
21 Facility and former Payless Rental Car Facility ("Payless Facility") created the plume at  
22 issue here. Gasoline leaked to soil, migrated to groundwater, dissolved in groundwater  
23 and moved with groundwater flow. Because the former Payless Facility was located west  
24 (up-gradient) of the Avis Facility and groundwater flows generally from west to east,  
25 releases to groundwater from the two facilities commingled creating a large and  
26 persistent contaminant plume. See 2000 Off-site Corrective Action Plan, attached as  
27 **Exhibit 1** at NDEP 7-10. Unlike some of the other dissolved constituents, MTBE  
28

1 extended as far as Maryland Parkway (about 4,000 feet from the source areas<sup>1</sup>). See  
2 McCarran MTBE Map Q4 2017, attached as **Exhibit 2** at NDEP 37.

3 Due to successful source area remediation and natural attenuation, the MTBE  
4 plume associated with the releases described above has reduced in concentration and  
5 separated from the contaminant sources. The detached plume relevant to this case is  
6 beneath a 3.5-acre surface area approximately two thousand feet northeast of the Avis  
7 site (the “Off-site Plume”). The Off-site Plume is located east of McCarran International  
8 Airport, between Paradise Road and Maryland Parkway in Las Vegas, Nevada. The  
9 property above the Off-site Plume is mostly residential.

10 The entire Avis/Payless commingled MTBE plume, from the source areas to the  
11 leading edge, reached a maximum known length of approximately 4,000 feet around 2012.  
12 The residual Off-site Plume, as defined by MTBE concentrations greater than 200  
13 micrograms per liter (µg/L), is currently approximately 400 feet wide and 1,100 feet long.  
14 Approximately 33 off-site monitoring wells (OMW) are regularly sampled in the area of  
15 the Off-site Plume. As of December 2017, MTBE concentrations exceed 200 µg/L in nine of  
16 these monitoring wells. Depth to groundwater at the site is approximately 15 to 20 feet.  
17 Concentrations of MTBE above 200 µg/L are located primarily between 45 and 70 feet  
18 below ground surface.

## 19 2. *MTBE Concentrations*

20 As of the Fourth Quarter of 2017, the highest level of MTBE detected in the Off-site  
21 Plume was 1,400 µg/L (OMW-43-60, OMW-74-61, and OMW-73-57). See Exhibit 2 at  
22 NDEP 37. The most recent analysis of groundwater sampling in December 2018 shows  
23 that the highest level of MTBE in this area is 1,200 µg/L (OMW-74-61 and OMW-43-60).  
24 See McCarran MTBE Map Q4 2018, attached as **Exhibit 3** at NDEP 39. MTBE

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25  
26 <sup>1</sup>Source area, as used here, means the soil and groundwater in the immediate  
27 vicinity of releases from USTs that are contaminated with petroleum hydrocarbons. These  
28 areas are typically heavily contaminated as a result of close proximity to the gasoline that  
leaked from the USTs. The contaminated soil frequently is saturated with petroleum  
hydrocarbons and the petroleum is present as “oil” droplets held between soil grains in  
pore spaces and adhered to soil particles. Groundwater that flows through the source  
areas dissolves some of the petroleum hydrocarbons which results in dissolved petroleum  
plumes extending some distance down-gradient.

1 concentrations within the Avis/Payless commingled MTBE plume have decreased  
2 significantly since the releases were first detected. MTBE concentrations in the  
3 remaining Off-site Plume are decreasing an average of approximately 8.25% per year. *See*  
4 Draft Fate and Transport Report attached as **Exhibit 4** at NDEP 54. This decrease is  
5 occurring naturally, and likely is the result of successful remediation in the source areas  
6 and in the former Howard Johnson area (between Paradise Road and Swenson Street)  
7 which significantly decreased overall contaminant mass and created the conditions for  
8 natural attenuation to succeed. This natural attenuation is expected to continue without  
9 any further intervention, and will likely result in MTBE concentrations being below 200  
10 µg/L within 23 years. *Id.* at NDEP 55.

### 11 3. Vapor Intrusion

12 ABCR's environmental consultant, Broadbent and Associates, Inc. ("Broadbent")  
13 conducted a Screening Risk Assessment<sup>2</sup> of the plume in December 2000. The Screening  
14 Risk Assessment analyzed groundwater concentrations of contaminants to evaluate the  
15 potential risks associated with migration of volatile organic compounds (VOCs) from  
16 groundwater to indoor and outdoor air at five locations above the Avis/Payless  
17 commingled plume (the larger Off-site Plume extent at that time). *See* the Screening Risk  
18 Assessment attached as **Exhibit 5** at NDEP 84. More specifically, the Screening Risk  
19 Assessment analyzed the following concentrations of benzene, toluene, ethylbenzene and  
20 xylenes (BTEX) and MTBE to evaluate inhalation risk to residents from VOCs: (1)  
21 historical high concentrations; (2) twice the historical high concentrations and; (3) then  
22 current concentrations of BTEX and MTBE (which are now significantly lower). *Id.* at  
23 NDEP 86. The Screening Risk Assessment found that volatilization of VOCs from  
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26 <sup>2</sup> A screening risk assessment is a conservative health risk assessment conducted  
27 to provide a high level of confidence in determining a low probability of adverse risk. In  
28 this instance, Broadbent used site-specific contaminant concentrations in groundwater  
and estimates of double the historic highest contaminants concentrations detected to  
provide for a conservative evaluation of potential inhalation risks to commercial workers  
and residents from five volatile organic compounds (BTEX and MTBE) present within the  
contaminated groundwater.

1 groundwater to indoor and outdoor air did not represent a significant exposure risk for  
2 commercial workers or residents above the commingled plume. *Id.* at NDEP 92.

3 The Screening Risk Assessment concluded that the incremental lifetime cancer risk  
4 and noncancer hazard risk were both below the de minimis levels (one-in-one million and  
5 Hazard Index of 1). *Id.* Thus, even assuming a concentration double that of the  
6 Avis/Payless commingled plume's historic high, the Screening Risk Assessment concluded  
7 that no carcinogenic or non-carcinogenic health hazards existed. *Id.* at NDEP 162-63. For  
8 this reason, NDEP concluded there was a very low risk to human health from vapor  
9 intrusion into homes or inhalation of outdoor air by residents and others that would live  
10 and work above the commingled plume for extended periods of time.

#### 11 4. Domestic Wells

12 In October of 2016, a sensitive receptor<sup>3</sup> survey (SRS)<sup>4</sup> was conducted to identify  
13 possible domestic or municipal drinking water wells - in the vicinity of the Off-site Plume.  
14 See the SRS attached as **Exhibit 6** at NDEP 244. The SRS found the closest domestic  
15 water wells to the edge of the Off-site Plume were four domestic water wells positioned  
16 more than 5,000 feet east of the distal end of the Off-Site Plume. *Id.*

17 On November 29, 2018, Broadbent sent NDEP a draft Fate and Transport Report<sup>5</sup>  
18 and BIOSCREEN Model<sup>6</sup> for the Off-site Plume. See Exhibit 4 at NDEP 43. The  
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20 <sup>3</sup> Sensitive receptors, as used here, include water wells, aquifer recharge zones,  
21 well fields where groundwater is extracted for municipal or other beneficial use, surface  
water bodies including washes that drain to surface water bodies, and wetlands.

22 <sup>4</sup> A sensitive receptor survey is an evaluation conducted for the potential presence  
23 of sensitive receptors, construction dewatering, and surface water intakes for potable  
water supplies and/or other beneficial uses within a defined distance from the  
groundwater contaminant plume. The evaluation distance is 1,000 feet for sensitive  
receptors and construction dewatering and one-half mile for surface water intakes.

24 <sup>5</sup> The Fate and Transport Report describes the input parameters used in the  
25 BIOSCREEN model to predict the maximum length that the Off-site Plume will extend  
without further remediation. The Fate and Transport Report was submitted to NDEP as  
26 an incomplete draft, but based on the information presented, NDEP understands that the  
Off-site Plume is not predicted to migrate east of Maryland Parkway, where the  
27 monitoring wells farthest down-gradient from the source areas are located. MTBE  
concentrations within the Off-site Plume are predicted to decrease to below 200 µg/L  
28 within approximately 23 years. The Fate and Transport Report, when finalized, and  
Sensitive Receptor Survey, will be used together to ensure that Sensitive Receptors are  
not predicted to be impacted by the MTBE contamination, in accordance with NAC  
445A.22725(2)(b).

1 BIOSCREEN model indicates that the residual MTBE plume would not migrate to  
2 threaten these domestic water wells. *Id.* at NDEP 55. The BIOSCREEN notes that the  
3 “Off-site Plume has been contracting away from the Distal End Area since the Maryland  
4 Transect of monitoring wells were installed in 2011.” *Id.* at NDEP 50.

5 Further, the BIOSCREEN model calculates the MTBE plume will not extend more  
6 than about 600 feet down-gradient from monitoring well OMW-79-52 (no further east  
7 than Maryland Parkway) and that “MTBE concentrations will naturally attenuate to  
8 below 200 µg/L within the next 23 years. The results are based on historical observations  
9 and assume that biodegradation will continue at the current rates and that potentially  
10 limiting factors do not appreciably change in the future.” *Id.* at NDEP 55. Thus, according  
11 to ABCR’s own data, allowing MTBE within the Off-site Plume to naturally attenuate  
12 poses no danger to any existing domestic or municipal wells.

13 Additionally, it is unlikely that any domestic or municipal wells will be installed  
14 during the natural attenuation timeframe. NAC 534.315(7) prohibits the drilling of new  
15 domestic water wells in areas where water service is available from a municipal water  
16 system without a waiver from the Division of Water Resources. State Engineer Amended  
17 Order 1054 states that, with few exceptions, the State Engineer will deny applications  
18 filed after March 23, 1992, to appropriate water within the designated Las Vegas Artisan  
19 Basin. Properties throughout the Off-site Plume currently receive municipal water. As  
20 such, future development would connect to the municipal water system. The municipal  
21 water system obtains water from Lake Mead and other groundwater sources many miles  
22 northwest of the Off-site Plume. Based on areas historically selected by the local water  
23 district for constructing municipal water wells, NDEP does not anticipate municipal  
24 water wells would be constructed within the Off-site Plume area.

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26  
27 <sup>6</sup> The BIOSCREEN model uses known or estimate input parameters, such as  
28 source area contaminant concentration and mass, groundwater velocity, contaminant  
affinity for soil (“stickiness”) and estimated biodegradation rate to predict the maximum  
length of the Off-site Plume and the time to naturally attenuate to below 200 µg/L. The  
model simulates these factors to estimate MTBE concentrations within the Offsite Plume  
and extending down-gradient.

1                   5.       *No Risk To Human Health Or The Environment*

2                   Ultimately, NDEP finds that the MTBE plume, in its present and expected future  
3 state, does not pose a risk to human health and the environment. NDEP reached this  
4 conclusion because: (1) no additional mass of MTBE has been detected through semi-  
5 annual groundwater monitoring events moving from the source areas to the Off-site  
6 Plume area over the past six years or more; (2) the rate of biodegradation of the Off-site  
7 Plume has been calculated at about 8.25% per year over the last four years; (3) the  
8 majority of monitoring wells in the Off-site Plume area show decreasing MTBE  
9 concentrations over time, and no evidence indicates that the mechanisms involved in  
10 natural attenuation (including the rate of biodegradation) will change appreciably in the  
11 foreseeable future; (4) based on the results of the December 2000 Screening Risk  
12 Assessment, there is a very low risk to human health from vapor intrusion of VOCs into  
13 homes or inhalation of outdoor air by residents and commercial workers that would live  
14 and work above the Off-site Plume and; (5) no domestic water wells will be affected by the  
15 Off-site Plume.

16  
17                   C.       Avis's CAP Addendum

18                   On September 27, 2018, ABCR submitted the CAP Addendum for the Commingled  
19 MTBE Plume to NDEP. *See* the CAP Addendum attached as **Exhibit 7** at NDEP 266.  
20 NDEP did not request the CAP Addendum, and ABCR did not identify any authority for  
21 NDEP to consider the proposal. The CAP Addendum states that between the years 2014-  
22 2017, monitoring wells within the Offsite Plume with the highest concentrations of MTBE  
23 experienced a yearly reduction in MTBE levels of 16%. *Id.* at NDEP 270. The CAP  
24 Addendum also notes that aerobic biodegradation occurs more quickly than anaerobic  
25 biodegradation. *Id.* The CAP Addendum speculates that conditions could become  
26 anaerobic once remediation up-gradient in the source areas is completed. *Id.*

27                   1.       *CAP Addendum Proposal*

1           The CAP Addendum proposes an attempt to enhance naturally occurring  
2 biodegradation of the MTBE dissolved in groundwater by increasing the concentrations of  
3 dissolved oxygen (DO) and some nutrients (nitrogen and phosphorus) in the groundwater  
4 within the Off-site Plume. *Id.* at NDEP 273. The CAP Addendum proposes the  
5 installation of 15 remediation wells in the Off-site Plume. *Id.* Canisters containing  
6 Provectus Oxygen Release Substrate (ORS), a proprietary blend of oxygen releasing  
7 compounds and nutrients, would be suspended in the screened sections of the remediation  
8 wells, in an attempt to increase the concentrations of DO and nutrients in the Off-site  
9 Plume.

10           The CAP Addendum proposes to deploy the ORS canisters for a period of one year,  
11 with increased monitoring and sampling of some existing groundwater monitoring wells  
12 to determine if the concentrations of DO and nutrients are increasing, and if so, whether  
13 MTBE concentrations are decreasing at a faster rate. The CAP Addendum does not  
14 specify a timeframe for conducting post-corrective action groundwater monitoring and  
15 sampling. *Id.* at NDEP 275-76.

16           The CAP Addendum does not expressly describe the remedial objectives or goals.  
17 The Introduction section notes that “NDEP has requested that the former car rental  
18 agencies expedite progress toward case closure” and indicates that the CAP Addendum  
19 remediation strategy is “designed with the objective of moving more expediently toward  
20 case closure through the implementation of this groundwater cleanup alternative to cost-  
21 effectively reduce MTBE concentrations in the Off-site Plume.” *Id.* at NDEP 269. Notably,  
22 the CAP Addendum makes no claim that human health or the environment is at risk  
23 without the suggested corrective action.

## 24                           2.       *Untested Strategy*

25           The remedial strategy in the CAP Addendum has not been pilot tested at the site.  
26 The CAP Addendum includes the results of limited sampling and analysis that Broadbent  
27 conducted to determine the presence of naturally occurring bacteria and nutrient  
28 concentrations in the Off-site Plume. The investigation concluded that bacteria



1 populations are sufficient for aerobic biodegradation of MTBE, but that generally low  
2 concentrations of DO, and to a lesser extent, nutrients, may be limiting aerobic  
3 biodegradation. *Id.* at NDEP 272-73.

4       Prior remediation at the release sites included direct mass removal, mass phase  
5 change and extraction, and direct destruction of gasoline constituents in the source areas.  
6 Successful remediation of the source areas at the Avis and Payless sites resulted in  
7 significant decreases in MTBE concentrations in the Avis/Payless commingled MTBE  
8 plume. These decreasing concentrations may be a result of cleaner groundwater  
9 migrating from up-gradient, increased DO concentrations migrating from the remediated  
10 areas, or both. *See* Commingled MTBE Plume History attached as **Exhibit 8** at NDEP  
11 306.

12       The CAP Addendum does not make any predictions on the effect the proposed  
13 remediation might have on MTBE biodegradation rates in the Off-site Plume. NDEP  
14 concedes that the proposed remediation could increase MTBE biodegradation rates, but  
15 the magnitude of this potential rate increase is highly uncertain. NDEP contends that  
16 current biodegradation rates are resulting in diminishment of the MTBE plume and are  
17 protective of human health and the environment. In the absence of further remediation,  
18 MTBE concentrations are predicted to be consistently below 200 µg/L within 23 years. *See*  
19 Exhibit 4 at NDEP 55.

20       Moreover, NDEP believes that the CAP Addendum's proposed action would not  
21 sufficiently reduce MTBE concentrations to less than the site-specific action level of 200  
22 µg/L within ABCR's projected timeframe. The Conceptual Site Model for the area of the  
23 Off-site Plume shows conditions below the water table that include discontinuous coarse-  
24 grained soil layers separated by a majority of fine-grained soils. *See* Draft Hydrogeologic  
25 Conceptual Site Model Report attached as **Exhibit 9** at NDEP 329-30. The residual  
26 MTBE in this off-site area is held within the pore water within the pore spaces  
27 between fine-grained soil particles and back diffusion<sup>7</sup> into the coarse-grained layers

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28 <sup>7</sup> Back diffusion, as used herein, means the movement of contaminants from an  
area of higher concentration within the pore water in low hydraulic conductivity soils

1 occurs due to a concentration gradient. The use of oxygen release material is  
2 expected to only directly affect MTBE in the coarse-grained layers and back diffusion  
3 of MTBE will replenish the concentrations in the coarse-grained layers. *Id.* at NDEP  
4 373-74. Given these conditions, NDEP believes the use of oxygen releasing material will  
5 have a limited effect on stimulating sufficient biological activity to fully remediate the  
6 remaining MTBE to 200 µg/L within the CAP Addendum’s projected one year of  
7 remediation. NDEP estimates that the CAP Addendum would take much longer than one  
8 year to result in a clean closure. This shorter timeframe would not change NDEP’s  
9 assessment that the MTBE plume does not pose an unacceptable risk to human health or  
10 the environment.

### 11 3. Cost

12 ABCR contends that the CAP Addendum would cost approximately \$150,000, and  
13 that Nevada’s Petroleum Fund (the “Petroleum Fund”) should pay for this expense. *See*  
14 Opening Brief at 8. The tasks listed as being included in the estimate are: remediation,  
15 monitoring of remediation effectiveness, and conducting one year of post-remediation  
16 verification monitoring. *See* Statement of Jason Hoffman attached as **Exhibit 10** at  
17 NDEP 419. ABCR also indicates that annual monitoring in the Off-site area costs  
18 approximately \$50,000. *Id.*

19 NDEP believes this \$150,000 figure is significantly underestimated. The estimate  
20 only includes one year of remediation and one year of verification monitoring. However,  
21 the CAP Addendum does not conclude that MTBE would be below action levels after one  
22 year of remediation. Instead, the CAP Addendum only states that it would “move more  
23 expediently towards case closure.” *See* Exhibit 7 at NDEP 269. The CAP Addendum  
24 concludes that the proposal would “accelerate the rates of natural biodegradation,” but  
25 provides no timetable for when ABCR would be able to obtain the clean closure it seeks.  
26 *Id.* at NDEP 272-73.

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(fine grained clays and silts) back into higher hydraulic conductivity soils (coarse grained sands) where the contaminants were initially present at elevated concentrations.

1 Currently, monitoring and sampling of the Off-site plume is conducted semi-  
2 annually. NDEP routinely requires quarterly monitoring during remediation and post-  
3 corrective action and monitoring. NDEP believes that the \$150,000 estimate for  
4 implementation of the CAP Addendum does not fully account for the following costs:

5 - Installation of 15 remediation wells and plugging and abandoning of these wells  
6 following remediation.

7 - Certified Environmental Manager (CEM) costs associated with oversight of the  
8 remediation well installation and eventual abandonment.

9 - CEM costs associated with the deployment of the ORS canisters, change outs of  
10 the canisters, additional sampling and laboratory analysis.

11 - Increasing monitoring and sampling of the monitoring wells to quarterly from the  
12 current semi-annual schedule.

13 - Quarterly monitoring and sampling of the monitoring wells until all MTBE  
14 concentrations have reduced to below 200 µg/L. As stated above, NDEP believes that the  
15 timeframe for this to occur will be significantly longer than 2 years.

16 In the Opening Brief, ABCR makes it clear that it does not intend to seek a  
17 groundwater exemption closure. *See* Opening Brief at 10 (“ABCR has not requested a  
18 groundwater exemption closure and does not intend to request such a closure at this  
19 time”). The alternative, a “clean” closure, would require additional remediation and/or  
20 groundwater monitoring until all wells had MTBE concentrations below 200 µg/L for a  
21 minimum of one year. Factoring in a realistic cost estimate for implementation, increased  
22 frequency of monitoring, and longer duration of monitoring, NDEP estimates that the  
23 CAP Addendum would far exceed ABCR’s \$150,000 estimate.

#### 24 4. *Denial*

25 On October 15, 2018, NDEP sent a letter to ABCR stating that NDEP did not  
26 concur that remediation is necessary for the Off-site Plume. *See* NDEP’s October 15, 2018  
27 Letter attached as **Exhibit 11** at NDEP 423. NDEP found that previous corrective  
28 actions addressing up-gradient source areas have successfully reduced MTBE

1 concentrations, and that MTBE levels will continue decreasing due to natural  
2 attenuation. *Id.* at 424. Given the stability of the plume, and the lack of domestic water  
3 wells in the area, NDEP directed ABCR to submit documentation in support of a request  
4 for a groundwater exemption closure. *Id.*

5  
6 D. The Petroleum Fund

7 40 C.F.R. § 280.93, which is adopted by reference in NAC 459.993(1), requires all  
8 owners and operators of underground storage tanks (USTs) to demonstrate financial  
9 responsibility for taking corrective action and for compensating third parties for bodily  
10 injury and property damage caused by accidental releases. Enrollment in the Petroleum  
11 Fund satisfies this federal requirement. The Nevada Legislature created the Petroleum  
12 Fund because “protection of this State’s environment, *particularly its supplies of water*,  
13 requires prompt cleaning up of any discharge of petroleum from a storage tank.” *See* NRS  
14 445C.290(1) (emphasis added). The Petroleum Fund’s statutes provide that NDEP “shall  
15 administer the Fund for the purposes prescribed” in the NRS. *See* NRS 445C.310(1).  
16 Thus, NDEP is directed to use the Petroleum Fund as it finds necessary to protect the  
17 State’s environment, particularly its supplies of water.

18 The Petroleum Fund obtains funding by collecting a \$100 annual fee for each  
19 registered storage tank. *See* NRS 445C.340(1). Additionally, the Petroleum Fund gets a  
20 fee of ¾ cent for each gallon of motor vehicle fuel, diesel fuel grades number 1 and 2, and  
21 heating oil imported into or refined in Nevada. *See* NRS 445C.330(1).

22 In the event of a discharge costing over \$5,000.00 from a compliant UST, the  
23 Petroleum Fund will pay 90% of the first \$1,000,000 for cleaning up the UST discharge,  
24 and 90% of the first \$1,000,000 of liability for damages from each UST discharge. *See*  
25 NRS 445C.380(3). The operator is responsible for 10% of the first \$1,000,000 for cleanup  
26 and liability, as well as any cost for cleanup or damages in excess of the amounts above.  
27 *Id.*

1 ABCR currently uses Petroleum Fund coverage for releases from two UST systems.  
2 Thus, the Petroleum Fund would cover a maximum of \$1,800,000 for cleanup and  
3 \$1,800,000 for third party liability. The Petroleum Fund has already expended  
4 \$1,665,121.65 to cleanup ABCR's discharges, leaving approximately \$134,878.35 in  
5 remaining maximum coverage for corrective action. See Petroleum Site Summary Report  
6 attached as **Exhibit 12** at NDEP 427. \$1,800,000 remains in the unlikely event ABCR is  
7 pursued from a third party for liability as a result of the discharges. *Id.*

## 8 **II. LEGAL ANALYSIS**

### 9 **A. Legal Standard**

10 ABCR's Appeal is based on NAC 445B.890(2). That regulation provides that "any  
11 person aggrieved by a final decision of [NDEP] may . . . appeal the decision." See NAC  
12 445B.890(1). The subsections upon which ABCR bases its appeal require ABCR to show  
13 that: "(e) the final decision was clearly erroneous in view of the reliable, probative and  
14 substantial evidence on the whole record; and (f) the final decision was arbitrary or  
15 capricious or characterized by abuse of discretion." See NAC 445B.890(2)(e)-(f). These are  
16 high legal standards to meet, and require ABCR to show that NDEP did not have any  
17 reasonable basis for rejecting the CAP Addendum.

18 The reason NAC 445B.890(2) establishes such high standards of proof is clear - "an  
19 administrative agency charged with the duty of administering an act  
20 is impliedly clothed with the power to construe the relevant laws and set necessary  
21 precedent to administrative action, and the construction placed on a statute by the agency  
22 charged with the duty of administering it is entitled to deference." *Nev. Pub. Emps. Ret.*  
23 *Bd. v. Smith*, 129 Nev. 618, 624 (2013).

24 "On questions of fact, an administrative agency's decision is given deference;  
25 therefore, a reviewing court must confine its inquiry to determining whether the record  
26 provides substantial evidence supporting the administrative agency's decision." *State*  
27 *Indus. Ins. Sys. v. Bokelman*, 113 Nev. 1116, 1119, 946 P.2d 179, 181 (1997).  
28 "An agency's conclusions of law which are closely related to the agency's view of the facts

1 are entitled to deference.” *Id.* “Substantial evidence exists if a reasonable person could  
2 find the evidence adequate to support the agency's conclusion. *Elizondo v. Hood Mach.,*  
3 *Inc.*, 129 Nev. 780, 784 (2013); *see also White Pine Cty. Sch. Dist. v. Benavidez*, No. 70908,  
4 2017 WL 4217042, at \*1 (Nev. App. Sept. 15, 2017) (“substantial evidence is evidence  
5 which a reasonable mind would accept as adequate to support a conclusion”).

6  
7 B. NDEP Possesses The Legal Authority To Compel ABCR to Pursue a  
8 Groundwater Exemption Closure

9 When determining the validity of an administrative regulation, courts generally  
10 give “great deference” to an agency's interpretation of a statute that the agency is charged  
11 with enforcing. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293  
12 (2000). “The agency's own interpretation of its regulation is entitled to great weight.”  
13 *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 9 (1998).

14 ABCR contends that NDEP’s rejection of the CAP Addendum will require an  
15 additional 10 to 20 years of groundwater monitoring that will cost approximately \$50,000  
16 per year. *See* Opening Brief at 10. On the contrary, NDEP has made clear to ABCR that  
17 this is neither a necessary nor a good use of public funds. Instead, NDEP has told ABCR  
18 that the site is a good candidate for a groundwater exemption closure. NDEP is also  
19 pursuing groundwater exemption closures with Payless Car Rental and National Car  
20 Rental, the other parties involved in this or near-by groundwater cleanups from UST  
21 releases. A groundwater exemption closure would be the most effective use of Petroleum  
22 Fund resources to conclude this cleanup.

23 1. *The Off-site Plume Qualifies for a Groundwater Exemption Closure.*

24 NAC 445A.22725 establishes the criteria for a groundwater exemption. A  
25 groundwater exemption may be granted under that regulation so long as: (1) each source  
26 of the contamination is identified and controlled, or no source of the contamination  
27 remains; (2) the magnitude and extent of the contamination of the groundwater is known;  
28 (3) data are available from at least three years of quarterly monitoring, or another period

1 specified by the Division, and the data do not show a trend of increasing concentrations of  
2 the contamination in the body of the plume; (4) a demonstration is made which indicates  
3 natural attenuation is sufficient to reduce any concentration of the contamination below  
4 action levels or to prevent any migration of the contamination to a receptor; and (5) the  
5 groundwater contaminated by the release is not a source of drinking water and is not  
6 likely to be a source of drinking water in the future. *See* NAC 445A.22725.

7         The groundwater contamination remaining from the Avis releases, including the  
8 Off-site Plume, appears to fit all of the criteria set forth in NAC 445A.22725, and ABCR's  
9 Opening Brief makes no showing as to why the site would not qualify. Instead, the  
10 Opening Brief states only that "ABCR has not requested a groundwater exemption  
11 closure and does not intend to request such a closure at this time." *See* Opening Brief at  
12 10. "ABCR has repeatedly expressed its desire to seek a 'clean,' not exemption-based,  
13 closure to NDEP." *Id.* ABCR's desire, however, cannot serve as the basis for NDEP to  
14 approve corrective actions and expend Petroleum Fund resources unnecessarily and  
15 without merit. A groundwater exemption closure would be the most cost effective and  
16 efficient way to conclude this project, and would not result in an increased risk to human  
17 health or the environment. ABCR's CAP Addendum, on the other hand, would likely  
18 expend well in excess of \$150,000 in Petroleum Fund money to obtain a clean closure.  
19 While it is true that ABCR has not requested a groundwater exemption closure under  
20 NAC 445A.22725, NDEP possesses ample authority to compel ABCR to conduct work  
21 necessary to complete such a closure of the site.

22                 2.         *NDEP Has The Authority to Require ABCR To Pursue A Groundwater*  
23                                 *Exemption Closure.*

24         NAC 445A.2269(1) grants NDEP the authority to "require the owner or operator [of  
25 the release site] to conduct an assessment of the conditions at the site of the facility,  
26 including an assessment of the condition of the soil or water, or both, to determine the  
27 extent and magnitude of the contamination." The assessment must "characterize the  
28 relevant pathways specifically related to the site that affect public health and the

1 environment, including, without limitation, any information concerning sources of  
2 release, pathways and rates of migration of any released substances and any possible  
3 receptors of those substances.” See NAC 445A.2269(2)(a). NDEP may also require  
4 additional assessment information to “support the issuance of an exemption, waiver or  
5 determination that corrective action is not required . . .” See NAC 445A.22691(2). After  
6 receiving this information, NDEP “*may* require an owner or operator to take corrective  
7 action.” See NAC 445A.22725(1)(emphasis added). Once NDEP orders corrective action,  
8 “an owner or operator may . . . submit a written request to the Director for an exemption”  
9 from such corrective action. See NAC445A.22725(2).

10 When read in context, it is clear that NAC 445A.22725(2) was intended to provide a  
11 responsible party the opportunity to request exemption when NDEP ordered corrective  
12 action. This regulation was not intended, as ABCR suggests, to limit NDEP’s authority to  
13 order a responsible party to assess and characterize groundwater contamination and, if  
14 necessary, take corrective action.

15 ABCR’s argument ignores NDEP’s broad authority under NAC 445A.2269 and  
16 22691 to order ABCR to assess and characterize the Offsite Plume for the purpose of  
17 supporting its decision to either exempt, waive or determine that corrective action is not  
18 required. These activities may include, but are not limited to, all the data collection and  
19 informational items needed to satisfy the elements of a groundwater exemption closure  
20 under NAC 445A.22725(2).

21 NDEP is also granted broad authority to determine when corrective action is  
22 necessary to protect public health and the environment and when it is not. NDEP’s  
23 Oxygenated Fuel Corrective Action Guidance (October 1998) (the “Guidance”) *guides*, but  
24 does not limit, its exercise of this authority. See the Guidance attached as **Exhibit 13** at  
25 NDEP 429. The Guidance states that NDEP will require corrective action “where public  
26 health or the environment are perceived to be at risk of exposure above established  
27 numerical values.” *Id.* at NDEP 431. The Guidance notes “groundwater clean-up action  
28 levels for MTBE vary depending upon the potential for human health exposure, potential



1 for exposure of other fauna, and proximity to sensitive environments.” *Id.* at NDEP 433.  
2 The Guidance further states that “the determination of whether corrective action is  
3 necessary . . . will continue to be made by NDEP staff on a case by case basis.” *Id.* at  
4 NDEP 437. Thus, NDEP’s decision to require, or not require, corrective action is not  
5 limited or controlled by the groundwater action levels in the Guidance, but, rather is  
6 controlled by all of the information NDEP considers pertinent to determine whether the  
7 contamination in the groundwater presents a danger to public health and the  
8 environment.

9 C. NDEP’s Decision To Deny The CAP Addendum Was Reasonable and  
10 Supported By Substantial Evidence.

11 1. *Substantial Evidence*

12 In this case, NDEP need only show that its decision to reject the CAP Addendum  
13 was one that a reasonable mind would accept as adequate in light of the evidence. NDEP  
14 will not only meet, but also exceed this standard by demonstrating that a groundwater  
15 exemption closure is the most reasonable allocation of Petroleum Fund resources.  
16

17 ABCR’s CAP Addendum and Opening Brief fail to establish how its proposed  
18 corrective action is in the public’s interest. In this case, a groundwater exemption closure  
19 is protective of human health and the environment and represents the most efficient use  
20 of the Petroleum Fund. First, the Off-site Plume does not endanger the State’s supply of  
21 drinking water, as there are no domestic wells within that area, nor are any expected to  
22 be built during the timeframe for the MTBE’s natural attenuation. Second, the Screening  
23 Risk Assessment found that volatilization of VOCs from groundwater to indoor and  
24 outdoor air did not represent a significant exposure risk for commercial workers or  
25 residents above the commingled plume. Third, NDEP estimates the cost of the CAP  
26 Addendum would far exceed the cost to satisfy the elements for groundwater exemption  
27 without any tangible public benefit. All told, there is no credible evidence supporting the  
28

1 CAP Addendum, and more than substantial evidence to justify NDEP’s decision to deny  
2 the CAP Addendum.

3 Under NRS 445C.310(1), NDEP is tasked with administering the Petroleum Fund  
4 for the purposes described within those statutes. The first purpose that the Legislature  
5 identified for the Petroleum Fund is “protection of this State’s environment, *particularly*  
6 *its supplies of water.*” NRS 445C.290(1) (emphasis added). The Petroleum Fund is not a  
7 bank account for owners to use as they see fit. Rather, it is a fund that exists for NDEP to  
8 ensure resources exist to cleanup discharges that can affect human health and the  
9 environment. Administering the Petroleum Fund is not a task NDEP takes lightly, and  
10 NDEP is responsible for ensuring that the Petroleum Fund is not depleted in unnecessary  
11 situations.

12 NDEP interprets its authority to administer the Petroleum Fund to mean that it  
13 may approve expenditures to protect public health and the safety of the environment. In  
14 administering the Petroleum Fund, it is NDEP’s responsibility to ensure that the Fund is  
15 not depleted unnecessarily. NDEP must preserve Petroleum Fund money for future  
16 situations that may require expensive cleanups, especially if drinking water is  
17 contaminated.

18 2. *NDEP’s Decision Was Not Arbitrary or Capricious*

19 ABCR’s Opening Brief attempts to show that NDEP’s denial of the CAP Addendum  
20 was arbitrary and capricious by comparing it to the CAP for National Car Rental  
21 Facility’s (“National Facility”) cleanup. On May 18, 2017, NDEP approved remediation at  
22 the former National Facility because the area being remediated was the source area,  
23 where higher residual contamination (greater contaminant mass) was likely to persist  
24 without remediation. NDEP routinely requires remediation of source areas as experience  
25 has shown that by remediating source areas, the dissolved contaminant plumes that  
26 extend from these source areas attenuate more quickly and no longer pose a risk of  
27 further migration. Source area remediation allows for targeting the areas where  
28 petroleum hydrocarbons are adhered to soil grains and present as “oil” in the pore spaces

1 between the soil grains. Failing to remediate these source areas typically leads to a very  
2 long period of time that the groundwater contamination persists, which can increase the  
3 potential risk of human exposure and increase project costs.

4 Further, NAC 445A.22725(2)(a)(1) requires source control as one of the primary  
5 elements required to consider a case eligible for a groundwater exemption closure. NDEP  
6 required each of the other near-by former rental car facilities with releases to  
7 groundwater (Avis Facility and Payless Facility) to remediate their respective source  
8 areas for the same reasons. NDEP ordered remediation at the National Facility to reduce  
9 MTBE and benzene concentrations and mass to levels that would support a groundwater  
10 exemption closure.

11 Additionally, the CAP Addendum proposes a passive remediation strategy that has  
12 not been pilot tested at any of the car rental facilities. The National Facility is using  
13 PulseOx<sup>®</sup>, which destroys MTBE on contact, and was used for successful remediation in  
14 the sources areas for the Avis Facility and Payless Facility. Thus, the cleanup at the  
15 National Facility and the Off-site Plume present entirely different considerations.

16  
17 D. ABCR Lacks Standing to Bring an Appeal

18 Under NAC 445B.890(1), a party must be “aggrieved” in order to appeal NDEP’s  
19 final decision. A party is aggrieved “when either a personal right or right of property is  
20 adversely and substantially affected” by the decision. *Las Vegas Justice Court v. State*,  
21 No. 67209, 2016 WL 1175371, at \*1 (Nev. Mar. 21, 2016).

22 ABCR has not demonstrated that NDEP’s action adversely or substantially  
23 affected ABCR’s rights. To the contrary, NDEP is proposing a groundwater exemption  
24 closure, a procedure that would be a much lower cost than implementing the CAP  
25 Addendum. ABCR’s Opening Brief makes no showing, other than ABCR’s “desire,” as to  
26 why a groundwater exemption closure is not the most effective conclusion to this project.  
27 The Opening Brief makes no demonstration that a groundwater exemption closure  
28 endangers human health or the environment. ABCR’s appeal fails to demonstrate any

1 personal right or right of property that is adversely and substantially affected by NDEP's  
2 decision to deny the CAP Addendum, and thus ABCR is not "aggrieved" under NAC  
3 445B.890(1).

4         Additionally, ABCR was not required to submit a CAP Addendum for NDEP's  
5 consideration. NAC 445A.2273 provides that "an owner or operator who is required to  
6 take corrective action pursuant to NAC 445A.22725 shall submit to the Division a plan  
7 and schedule for completing the corrective action." This regulation does not provide for an  
8 owner or operator to submit new or additional plans for NDEP's consideration whenever  
9 it suits them. NDEP had not required any new corrective action of ABCR, and it was  
10 therefore out of the ordinary for ABCR to submit the CAP Addendum in this  
11 circumstance.

12  
13         E.     Granting ABCR's Appeal Would Jeopardize Future Use of the Petroleum  
14                 Funds and Undermine NDEP's Authority.

15 NDEP believes that a groundwater exemption closure process is protective of human  
16 health and the environment, and is the most responsible way to ensure appropriate  
17 spending of Petroleum Funds. NDEP does not have the responsibility to approve  
18 Petroleum Funds to reduce perceived corporate liability or to allow a responsible party to  
19 spend these funds any way they see fit. If the SEC were to decide in favor of ABCR,  
20 several problematic issues would arise.

21         First, NAC 445A.2273 states: "an owner or operator who is required to take  
22 corrective action pursuant to NAC 445A.22725 shall submit to the Division a plan and  
23 schedule for completing the corrective action. The owner or operator shall not take any  
24 corrective action until the plan and schedule are approved by the Division." The submittal  
25 of a plan and schedule for corrective action does not commit NDEP to approve the plan  
26 and schedule as written. If the SEC were to override NDEP's decision not to approve the  
27 CAP Addendum, it would undermine NDEP's authority.

1 Second, if the SEC were to decide in favor of ABCR, it would set the precedent that  
2 any responsible party could appeal to the SEC any time they disagreed with NDEP's  
3 decisions regarding management of corrective action cases. ABCR has not shown that  
4 NDEP's decision has caused harm or financial hardship. Rather, the Appeal appears to be  
5 based on perceived corporate liability, and ABCR's speculation that it may be sued. As  
6 stated, in the unlikely event ABCR is sued as a result of the residual MTBE impacted  
7 groundwater, \$1,800,000 remains in the Petroleum Fund for third party liability. If the  
8 Appeal were successful, SEC could find itself in the position of approving corrective action  
9 plans for any responsible party who does not like NDEP's decisions.

10 Lastly, the SEC cannot allow owners to perceive the Petroleum Fund as a bank  
11 account to spend however they see fit. An SEC ruling in ABCR's favor would incentivize  
12 responsible parties to unnecessarily burn through the \$1,800,000 maximum allotted  
13 public funds for each discharge. Would ABCR be requesting a clean closure, rather than  
14 an exemption closure, if the cost was coming out of its own pocketbook? Responsible  
15 parties that are paying for their own cleanups typically jump at the opportunity to obtain  
16 a groundwater exemption closure. However, when responsible parties are spending public  
17 funds, rather than their own, it is in their self-interest to pursue the most extensive (and  
18 expensive) cleanup possible, even when unnecessary, to limit any risk of liability. The  
19 Petroleum Fund was not created to serve a responsible party's self-interest, it was created  
20 to ensure that funding exists for cleanups that endangered human health and the  
21 environment. Allowing responsible parties to dictate the cleanup of sites would almost  
22 certainly result in the depletion of the Petroleum Fund and risk its insolvency.

23 **III. CONCLUSION**

24 For these reasons, NDEP requests that this Court deny ABCR's Appeal.

25 DATED this 14th day of February, 2019.

26 AARON D. FORD  
27 Attorney General

28 By: /s/ Daniel P. Nubel  
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9 **CERTIFICATE OF SERVICE**

10 I hereby certify that I am an employee of the State of Nevada, Office of the  
11 Attorney General, and on this 14<sup>th</sup> day of February, 2019, I served a copy of the foregoing,  
12 NDEP'S RESPONSE BRIEF, via email to:

13 Val King  
14 Executive Secretary  
15 State of Nevada  
16 State Environmental Commission  
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25 /s/ Daniel Nubel  
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28 Office of the Attorney General

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