JOHN L. MARSHALL, SBN 6733
570 Marsh Avenue
Reno, Nevada 89509
(775) 303-4882
johnmarshall@charter.net

Attorney for Appellant Comstock Residents Association

BEFORE THE NEVADA STATE ENVIRONMENTAL COMMISSION

In Re: Appeal of NDEP's Reclamation Permit 0315 (Dayton Consolidated Exploration Project; Comstock Mining Inc.)	)

APPELLANT CRA'S RESPONSE TO NDEP'S

MOTION TO DIMISS AND CMI's JOINDER

INTRODUCTION

On December 30, 2011, the Comstock Residents Association ("CRA") filed the instant appeal challenging the issuance of Reclamation Permit 0315 by the Nevada Department of Environmental Protection ("NDEP") to Comstock Mining Inc. ("CMI") for the Dayton Consolidated Exploration Project ("Project"). The Project lies within the Carson River Mercury Superfund ("CRMS") site and is adjacent to town of Silver City where many members of the CRA live, work and recreate. The CRMS exists because prior mining activities in the Comstock contaminated the soils in the area mercury,

arsenic, lead and other toxic materials. Mercury arsenic and lead poses substantial threats to public health, air quality and water quality.

CMI now desires to disturb soils within the CRMS to explore again for gold and silver. In conducting such exploration activities within the CRMS, CMI will encounter toxic chemical-laden soils. To address the very real threat of release of mercury contamination adjacent to residential areas, the United States Environmental Protection Agency ("EPA") and NDEP required CMI to prepare for approval a Sampling and Analysis Plan ("SAP") consistent with the CRMS Long-term Sampling and Response Plan in order to protect the citizens of the Comstock, as part of Reclamation Permit 0315.

However, when the NDEP published draft Permit 0315 on October 12, 2011, the critical SAP was not included as part of the permit because it was not yet prepared by CMI. Instead, NDEP simply included a permit condition requiring the subsequent submission of an acceptable SAP to NDEP. See Permit 0315 at 5 (Special Condition A: "The permittee shall submit to the Division Bureau of Corrective Actions, Superfund Branch, for review and approval, a Sampling and Analysis plan (SAP) which includes a standard operating procedure in the Long Term Sampling and Response Plan (LTSRP) guidance document for exploration activities that may disturb mine wastes and/or mill tailings within the Carson River Mercury Superfund Site (CRMS). The Division approved SAP shall be implemented prior to any mineral exploration activities within the CRMS.") Although the NDEP provided a 30-day comment period for the draft permit and general conditions, it did not include the SAP in this official public review, comment and appeal process. NDEP affirmatively chose not to subject the full permit to public review and instead stated that CRA "*will have an opportunity to review and comment on*

the SAP prior to final approval, even though there is no formal public comment process for this type of document. The [NDEP] has informed the CRA that the Division is not obligated to incorporate the comments, but would appreciate input." NDEP Permit 0315 Final Decision at Response 3 (italics original).

CRA members provided written and oral comments on the deficiencies of NDEP's draft permit, including as a result of absence of a draft or final SAP being deprived of a meaningful opportunity to comment on this critical aspect of NDEP's permit.

After holding a public hearing on the draft permit prior to availability of the SAP, NDEP issued the final permit on December 20, 2011. The SAP still had not been prepared. As required by law, CRA had only 10 days in which to file this appeal. CRA filed its appeal on December 30, 2012, before it had any opportunity to review the SAP.

The NDEP only made the SAP available as a courtesy to CRA members after NDEP issued the final permit and after CRA filed this appeal. On January 7, 2012, NDEP provided a link to an "ftp" website on which the draft SAP was housed. The SAP however is a massive document (over 600 pages in length) which CRA members could not reasonably download as it was loaded onto the ftp site as a single document. Despite the size of the document, NDEP demanded that CRA provide any comment on this huge technical document within 7 days. On January 10, 2012, a CRA member visited NDEP and obtained paper copies of the narrative text; NDEP only provided those portions of the draft SAP that NDEP staff deemed relevant for CRA to review. In response to CRA's request for more time to review this critical part of the reclamation permit, NDEP begrudging provided CRA with the weekend to conduct its review, making comments

due January 17, 2012 ("I told Gail Sherman that I would give you through this coming weekend for the review.")

At 2:30 p.m. on January 17, 2012, the CRA submitted quickly prepared comments on the draft SAP to NDEP via hand-delivery. Two hours later, NDEP emailed to a CRA member a copy of a previously prepared NDEP letter to CMI requiring only a few minor alterations. On January 2, 2012, NDEP reviewed CMI's alterations and provided final acceptance of the SAP. (CRA has filed with the SEC a Form 3 appeal of NDEP's January 2, 2012 acceptance of CMI's final SAP as satisfactory.)

NDEP now moves to dismiss CRA's appeal, which is primarily based on the procedural and substantive inadequacy of the Permit including the SAP, because NDEP alleges that CRA's Form 3 is not specific enough in its allegations. On February 3, 2012, CMI filed a joinder and with additional legal argument in support of NDEP's motion. For the reasons stated below, the SEC should reject NDEP Motion to Dismiss, withdraw the permit, and remand the draft permit, including the SAP for full public disclosure, comment and reanalysis.

A. NDEP Failed To Provide A Meaningful Opportunity to Comment

In its Motion to Dismiss, NDEP's asserts that "while CRA finds fault with NDEP's issuance of the Permit prior to approval of the SAP or related protections," the Permit is an "order" which allegedly provides NDEP with "greater flexibility" to use "schedules of compliance" to subsequently generate critical permit provisions. Motion to Dismiss at 5:4-7.

However, the provisions of NAC Chapter 419A and NRS Chapter 233B require that NDEP must provide the public and the applicant certain minimum processes. First,

NDEP must provide notice of reclamation permitting actions, including issuing a draft of the proposed permit. See NAC 419A.180. NDEP must then provide the public and applicant with 30 days to comment on the draft permit. NAC 419A.185. Upon issuance of its final decision on the draft permit, NDEP must respond in writing to all substantial public comments in order to justify its decision. NAC 419A.210.

In this case, it is undisputed that NDEP's draft permit did not include the SAP; instead it only included a condition that CMI must develop one and submit it for NDEP approval. It is also undisputed that NDEP's unofficial 7-day opportunity to review the draft SAP did not meet the 30-day requirement and that NDEP did not respond to the comments CRA submitted as required by law. Finally, it is undisputed that residents of the Comstock possess a strong and legitimate interest in fully participating in the preparation and approval of this essential part of the Permit given that proposed exploration activities are to place in the CMRS and the sampling and analysis plan is critical to guiding the location of land disturbing and reclamation activities. NDEP therefore violated the NAC and the NRS by failing to provide a meaningful opportunity for citizen review and comment upon the actual permit issued to CMI.

B. The Permit Fails To Protect Human Health

1. Characterization of Toxics Should Occur Prior to Permitting

CRA appealed the Permit because NDEP did not require CMI to conduct sampling and analysis prior to issuance of the Permit by including the SAP requirement as only a post-issuance condition of approval. As noted above, CMI proposed to disturb close to acres of soils within the CMRS with the potential to release toxic mercury, arsenic and lead. As a requirement for obtaining a permit for a reclamation plan, CMI

and NDEP "must consider . . . the effectiveness of the proposed activities for reclamation in ensuring public safety [and] . . . the potential for surface-water or groundwater quality resulting from the proposed activities for reclamation[.]" NAC 519A.260(3), (6). In order consider the effectiveness and adequacy of the reclamation plan to protect public safety and water quality, CMI should be made to submit, and NDEP made to consider, the whether the exploration activities are to take place in areas of toxic material. That is, in this relatively unique case of exploration within a superfund site laden with toxic materials, CMI should have submitted as part of its application materials site specific data on the presence toxics and the risks conducting exploration and reclamation activities at these specific site. Instead of having this information presented to it in order to gauge the adequacy of the reclamation plan per NAC 519A.260, NDEP improperly deferred the public disclosure of this information. In this same vein, CRA appealed the Permit because it did not address the how CMI should treat toxic material/wastes unearthed or exposed by CMI's exploration activities. Whether or not theses wastes fall under RCRA, NDEP should have included terms within the permit to address how CMI will treat and dispose of these materials. Without prior consideration of the existence and location of toxic materials and how they should be handled, NDEP's decision to issue the Permit was arbitrary.

2. SAP Fails to Address All Possible Contaminated Locations

Although it was not available to the public in any form prior to this appeal, NDEP staff indicated that the scope of the SAP would be limited to previously disturbed historic sites designated by CMI. CRA appealed that the restricted scope of the SAP because (1) previously disturbed historic sites are not the only possible location of toxic materials

because mercury was stored and disposed in undisturbed locations and could migrated via erosion and redeposition, and (2) NDEP must at least assess the technical adequacy of CMI's designations – particularly because the CMI's economic motivation to minimize SAP costs might bias it against including all relevant sites. CRA has been informed that NDEP did not conduct a separate analysis of the scope of historic sites included by CMI in the SAP. NDEP therefore failed to adequately protect the residents of the Comstock from potential toxic exposure by insuring that the SAP covers all appropriate areas.

3. NDEP may Impose Conditions to Protect Air and Water

It is clear from the NAC that NDEP may consider the protection of Nevada's land air and water when issuing reclamation permits. See e.g., NRS 519A.010(b) ("Proper reclamation of . . . areas of exploration . . . is necessary to prevent undesirable land and surface water conditions detrimental to the ecology and to the general health, welfare, safety and property rights of the residents of this state . . . ."); NAC 519A.260. However, when the CRA requested that the NDEP consider including air quality and water quality permits for to protect these resources, NDEP responded that it lacked the jurisdiction to address those resources areas within the context of a reclamation permit. See e.g., Permit 0315 Final Decision at Response 13 ("*Division Response: Mitigation or the monitoring of air, water and noise are beyond the scope and intent of the NAC 519A regulatory framework.*" (italics original).) In its appeal CRA contends that NDEP improperly restricted its scope and must, for example, address air and water quality issues as "detrimental to the ecology and general health and welfare" of the state. Since NDEP erred as a matter of law in its determination of the proper scope or its authority, the SEC

should remand the Permit to NDEP for further consideration in light of its actual powers to protect the ecology and health and safety of Nevada residents.

C. Reply to CMI's Additional Arguments

On February 3, 2012, CMI filed a brief in support of, and joining NDEP's Motion to Dismiss. In "CMI's Response," it posits additional reasons why the CRA's appeal should be dismissed. CRA responds briefly to these arguments here.[1]

1. CRA Members are Aggrieved

CMI argues that CRA and its members lack standing to bring this appeal because they are not aggrieved parties as required by NAC 519A.415(1). CMI Response at 2. The issuance of the Permit, however, will enable CMI to conduct exploration and reclamation activities within close proximity to where CRA members reside, work and recreate. As recognized by NDEP (who tellingly does not make this argument), the activities proposed by CMI have the distinct potential to release toxic pollutants in the area's air and water, as NDEP required the preparation of an SAP prior to exploration activities commencing. The exploration and reclamation activities have the potential to temporarily and permanently change the scenic appearance of the areas surrounding CRA members' homes. It is difficult to imagine a closer nexus between issuance of a permit and specific injury as in this case. See *Citizens for Cold Springs v. City of Reno*, 125 Nev. __, 218 P.3d 847 (2009); *Mesagate Homeowners' Ass'n v. City of Fernley*, 124 Nev. 1092 (2008); *Kay v. Nunez*, 120 Nev. 1100 (2006).

CMI also argues that CRA members some how lay outside of the "zone of interests" protected by the state Reclamation Law and therefore under this federal

[1] Given the short period of time CRA has to respond to CMI's arguments, CRA will provide a more extensive response to CMI's arguments should it deem it necessary.

prudential (as opposed to constitutional) standing notion, CRA lacks standing. The Nevada Supreme Court has yet to adopt the "zone of interest" test outside if the mandamus context (see e.g., *Mesagate*, supra) and the SEC should refrain from doing so. Moreover, even if the SEC were to apply the "zone of interests" in this administrative proceeding, CRA interests in protecting their local environment and property rights falls within the purposes for which the Nevada Legislature enacted NRS Chapter 519A. "Proper reclamation of . . . areas of exploration . . . is necessary to prevent undesirable land and surface water conditions detrimental to the ecology and to the general health, welfare, safety and property rights of the residents of this state . . . ." NRS 519A.010(b). Thus, CRA members' interests in the threat to its local ecology and general health and welfare and property rights fall with those interests sought to be protected by the Nevada Legislature.

2. The SEC May Remedy NDEP's Errors

Next, CMI asserts the absurd argument that the SEC lacks the authority to remedy NDEP errors. CMI's Response at 5-6. CMI may not move forward with its proposed exploration without a NDEP permit. NRS 519A.180 ("A person shall not engage in an exploration project without a valid permit for that purpose issued by the Division.") The question before the SEC is whether Permit 0315 issued by NDEP is in fact valid given the substantial issues raised by CRA's appeal and as detailed above. The SEC possesses the authority to, for example, find that NDEP violated the law by not providing the draft permit including a draft SAP for public review and comment and NDEP response. It may then conclude that the Permit 0315 was not validly issued and remand the matter back to NDEP for public review of the full permit. See NAC 519.415(4) (Upon appeal, "[t]he

Commission will affirm, modify or reverse any action of the Department which is appealed to it.") Indeed, to conclude that the SEC lacks the authority to review and remedy NDEP actions renders meaningless the appeal rights provided by NAC 519A.415. The SEC has the authority to consider the serious issues raised by residents of the Comstock, and if it finds them meritorious may modify or reverse the issuance of Permit 0315 by NDEP.

CONCLUSION

The SEC should deny NDEP Motion to Dismiss as the CRA has set forth specific grounds in this appeal to be heard on their merits by the Commission.

Dated: February 8, 2012.

/s/

JOHN L. MARSHALL, SBN 6733
570 Marsh Avenue
Reno, Nevada 89509
(775) 303.4882
johnmarshall@charter.net

Attorney for Appellant Comstock Residents Association

CERTIFICATE OF SERVICE

I certify that on the 8th day of February, 2012, I electronically served the CRA's Response to NDEP's Motion to Dismiss and CMI's Joinder upon the following parties:

Cassandra P. Joseph
Deputy Attorney General
cjoseph@ag.nv.gov
(Attorney for NDEP)

Carolyn McIntosh
Patton Boggs
cmcIntosh@pattonboggs.com
(Attorney for CMI)

John Walker, Secretary
State Environmental Commission
jbwalker@ndep.nv.gov

Rose Marie Reynolds
Deputy Attorney General
rreynolds@ag.nv.gov
(Attorney for SEC)

_____/s/_____
John L. Marshall